Supreme Court, U.S.
FILED

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Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

MARJORIE A. MEESTER,

Petitioner,

VS

MARVIN T. RUNYON, POSTMASTER GENERAL,
U.S. POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the majority of the Eighth Circuit panel below erred in concluding that a Federal Employee's Compensation Act claimant who has received benefits under the Federal Employee's Compensation Act cannot maintain a failure to accommodate claim under the Rehabilitation Act.

2. Whether the majority of the Eighth Circuit panel below erred in concluding that Petitioner's Motion to Amend her Complaint to seek exemplary damages was without merit.

LIST OF PARTIES

All parties to this Petition are listed in the caption.

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The Eighth Circuit's Order denying the Petition for Re-Hearing and Suggestion for Re-Hearing En Banc is unreported and set forth in Petitioner's Appendix. (App. 1.) The July 16, 1998 Eighth Circuit Opinion affirming the decision of the lower court is reported at 149 F.3rd 855 (8th Cir. 1998) and is set forth in Petitioner's Appendix. (App. 2-19.) The December 31, 1996 Memorandum and Order of the United States District Court for the District of North Dakota denying judgment as a matter of law and the motion for a new trial is unreported and set forth in Appendix at pages 20-22. The October 7, 1996 Judgment in a Civil Case by Jury Verdict is unreported and set forth at page 23 of Petitioner's Appendix.

The September 18, 1995 Memorandum and Order of the United States District Court for the District of North Dakota denying the United States Postal Service's Motion for Summary Judgment is unreported and set forth at pages 24-35 of Petitioner's Appendix. The May 17, 1996 Memorandum and Order of the United States District Court for the District of North Dakota vacating its denial of the United States Postal Service's Motion for Summary Judgment and dismissing Ms. Meester's failure to accommodate claim is unreported and set forth at pages 36-41 of Petitioner's Appendix. The May 17, 1996 Memorandum and Order of the United States District Court for the District of North Dakota staying the proceedings for an interlocutory appeal is unreported and set forth at pages 42-43 of Petitioner's Appendix. The June 10, 1996 Judgment of the United States Court of Appeals for the Eighth Circuit denying the Cross-petitions for permission to bring an interlocutory appeal is unreported and set forth at pages 44-45 of Petitioner's Appendix.

JURISDICTION

On July 16, 1998, the United States Court of Appeals for the Eighth Circuit entered its decision by a divided vote affirming the decision of the United States District Court for the District of North Dakota. (App. 2-19.) On September 29, 1998, the United States Court of Appeals for the Eighth Circuit entered its Order denying Ms. Meester's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 1.) This Petition was filed within 90 days after entry of the Order denying Ms. Meester's Petition for Rehearing and Suggestion for Rehearing En Banc. As a result, this Petition is timely pursuant to Rule 13.3 of the Rules of the Supreme Court of the United States. The statutory provision conferring jurisdiction to the Supreme Court of the United States to review Petitioner's Writ of Certiorari is 28 U.S.C. § 1254.

STATUTORY PROVISIONS AND REGULATIONS

1. 5 U.S.C. § 8101(5) (App. 46.)

2. 29 U.S.C. § 791(b) (App. 47.)

3. 29 U.S.C. § 794a(a)(1) (App. 48.)

4. 42 U.S.C. § 1981a(a)(2) (App. 49.)

5. 42 U.S.C. § 1981a(a)(3) (App. 50.)

6. 42 U.S.C. § 1981a(b)(1) (App. 51.)

7. 42 U.S.C. § 2000e-16(a) (App. 52.)

8. Fed. R. Civ. P. 15(a) (App. 53.)

9. Fed. R. Civ. P. 56(c) (App. 54.)

10. 29 C.F.R. § 1614.203(b) (App. 55.)

11. 29 C.F.R. § 1614.203(c)(1) (App. 56.)

STATEMENT OF THE CASE

A. Procedural Background

Petitioner, Marjorie A. Meester, commenced this action on April 13, 1994, by filing a complaint with the United States District Court for the District of North Dakota. Ms. Meester alleged disability discrimination in violation of the Rehabilitation Act, 29 U.S.C. § 791 et seq. Ms. Meester claimed that the United States Postal Service, Respondent, failed to provide her with proper rest breaks according to her physician's recommendations, and further, that the United States Postal Service failed to provide her with two consecutive days off for rest as recommended by her attending physician.

On April 26, 1995, the United States Postal Service moved to dismiss Ms. Meester's complaint, or in the alternative for summary judgment. Magistrate Karen Klein for the United States District Court for the District of North Dakota denied the United States Postal Service's Motion for Summary Judgment by Memorandum and Order filed on September 18, 1995. (App. 24-35.) The United States Postal Service moved for reconsideration of the Memorandum and Order denying its Motion for Summary Judgment. On May 17, 1996, the lower court reversed its original September 18, 1995 Memorandum and Order and held that Ms. Meester's recovery of Federal Employees Compensation Act (hereinafter "FECA") benefits precluded her failure to accommodate claims brought pursuant to the Rehabilitation Act, 29 U.S.C. § 791

et seq. (App. 36-41.) As a result, the parties stipulated to and the lower court granted a stay of the proceedings in order for the parties to pursue interlocutory appeals. On June 10, 1996, the United States Court of Appeals for the Eighth Circuit denied the Cross-Petitions for permission to bring an interlocutory appeal. (App. 44-45.)

On August 23, 1996, Ms. Meester moved to amend her complaint to include a claim for exemplary damages based upon the then recent holding in Baker v. Runyon, 922 F.Supp. 1296 (N.D. Ill. 1996), and for clarification purposes. On September 13, 1996, the lower court denied Ms. Meester's Motion to amend her complaint to seek exemplary damages.

On September 30, 1996, a jury trial was commenced and resulted in a jury verdict in favor of the United States Postal Service. (App. 23.) On October 11, 1996, Ms. Meester moved for judgment as a matter of law, or alternatively, for a new trial. On December 31, 1996, the lower court denied Ms. Meester's Motion for judgment as a matter of law, or alternatively, for a new trial. (App. 20-22.)

On January 30, 1997, Ms. Meester filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. On July 16, 1998, the United States Court of Appeals for the Eighth Circuit affirmed the lower court. (App. 2-19.) Subsequently, Ms. Meester requested a rehearing, and on September 29, 1998, the United States Court of Appeals for the Eighth Circuit denied Ms. Meester's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 1.)

The United States District Court for the District of North Dakota, Southeastern Division, had original jurisdiction pursuant to 28 U.S.C. § 1331 as this action involved a federal question. Ms. Meester is now petitioning for a Writ of Certiorari to the Supreme Court of the United States.

B. Facts

In 1978, Ms. Meester began working for the United States Postal Service as a clerk in Cooperstown, North Dakota. In 1984, Ms. Meester transferred to the West Fargo Post Office, and then in 1988, Ms. Meester transferred to the newly opened Prairiewood Station of the Fargo Post Office. Throughout her transfers, Ms. Meester remained classified as a clerk at the United States Postal Service.

In July of 1988, while working for the United States Postal Service, Ms. Meester suffered a work-related injury and was diagnosed with chronic tendinitis of the elbows. In January of 1989, Ms. Meester suffered a reinjury while at work, and in June of 1989, Ms. Meester was diagnosed with carpel tunnel syndrome in both of her wrists which required two surgeries; one for each wrist. As a result of these work-related injuries, Ms. Meester has been diagnosed and deemed to have a 25% partial permanent impairment of her upper extremities.

While Ms. Meester was recuperating and performing rehabilitation, the United States Postal Service demanded that she return to work immediately. As a result, Ms. Meester and her attending physician, Dr. Gregory Orson, arranged for an occupational therapist to accompany Ms. Meester to the work site to perform an evaluation of work duties to determine what work duties were within Ms. Meester's physical limitations. On March 4, 1991, Ms. Meester, accompanied by an occupational therapist, returned to work for an on-site evaluation. The Prairiewood Station Manager forced Ms. Meester to sign and accept the United States Postal Service's job offer or else he would not allow the occupational therapist to perform an on-site evaluation. Pursuant to the duress, Ms. Meester accepted the United States Postal Service's job offer that failed to provide for scheduled rest breaks and two consecutive days off per work week as recommended by her attending physician. Ms. Meester signed the

job offer so that the occupational therapist would be allowed to perform an on-site evaluation. Subsequent to March 4, 1991, Ms. Meester and her attending physician consistently made accommodation requests of scheduled rest breaks and two consecutive days off of work per week for rest. The United States Postal Service refused these requests, and as a result, Ms. Meester initiated an EEO complaint, exhausted her administrative remedies, and filed a complaint against the United States Postal Service in the United States District Court for the District of North Dakota.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Pursuant to Rule 10(a) and (c) of the Rules of the Supreme Court of the United States, Ms. Meester requests that this court grant her Writ of Certiorari. Rule 10(a) of the Rules of the Supreme Court of the United States provides that a reason for granting a writ can be based upon the fact that "a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter". Further, Rule 10(c) of the Rules of the Supreme Court of the United States provides that a reason for granting a writ can be based upon the fact that "a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court."

A. Conflicting Decisions - Rule 10(a)

With regard to Ms. Meester's first issue that of whether her receipt of FECA benefits bars her subsequent failure to accommodate claim brought pursuant to the Rehabilitation Act, the decision of the United States Court of Appeals for the Eighth

Circuit's in this case is inconsistent with various United States Court of Appeals and United States District Courts. For example, in Callanan v. Runyun, 903 F. Supp. 1285 (D. Minn. 1994), aff'd 75 F.3d 1293 (8th Cir. 1996), the court concluded that FECA does not include recovery under Title VII specifically, and generally, is equally applicable to other anti-discrimination statutes such as the Rehabilitation Act. In reaching its conclusion, the court cited several federal decisions for support. Id. at 1296; see, e.g. Miller v. Bolger, 802 F.2d 660, 663-64 (3d Cir. 1986) (stating the FECA was intended only to be a substitute for suits against the United States for tortious injury and not intended to preclude actions for discrimination subsequent to a FECA recovery); Eckley v. Bentsen, 1994 WL 114646 at *7 (D.D.C. 1994) (stating that FECA and Title VII create separate remedies for distinct types of injuries); Nichols v. Frank, 771 F. Supp. 1075, 1079 (D. Or. 1991) (finding that FECA does not bar recovery under Title VII when there is no double recovery); Gergick v. Austin, 764 F.Supp. 580, 581 (W.D. Mo. 1991) (finding that FECA is exclusive remedy for work-related personal injuries only and is not a bar to recovery for injuries due to discrimination); Johnson v. Sullivan, 764 F. Supp. 1053, 1063 (D. Md. 1991) (stating that Title VII and Rehabilitation Act claims are not barred by receipt of FECA benefits); George v. Frank, 761 F. Supp. 256, 259 (S.D.N.Y. 1991) (finding that FECA coverage, which is most commonly associated with work-related injuries, clearly fails to preclude a request to pursue discrimination claims under the umbrella of equitable remedies available under Title VII); Sullivan v. United States, 428 F. Supp. 79, 81 (E.D. Wis. 1977) (stating that injuries compensable under FECA include injuries by accident and disease, not claims for discrimination); see also Nichols v. Frank, 42 F.3d 503, 515 (9th Cir. 1994) (stating that the exclusivity provisions of FECA apply only to additional payments for work-related injuries); Reidy v. Runyon, 971 F. Supp. 760, 769-71 (E.D.N.Y. 1997) (finding that receipt of FECA benefits does not preclude

recovery under Rehabilitation Act because the statutes are not mutually exclusive); Taylor v. Secretary of Navy, 852 F. Supp. 343, 351-53 (E.D. Pa. 1994) (stating FECA benefits do not preclude recovery under the Rehabilitation Act), aff'd Taylor v. Dalton, 61 F.3d 896 (3d Cir. 1995) (unpublished table decision).

The decision by the Court of Appeals for the Eighth Circuit in this case fails to account for the fact that the FECA and the Rehabilitation Act provide distinctly different forms of relief. The FECA only allows employees to recover lost wages and medical costs incurred as a result of injuries which are sustained in the performance of their duties. Miller v. Bolger, 802 F.2d at 662. In contrast, the relief available under the Rehabilitation Act includes the equitable remedies as back pay, front pay, attorney's fees, injunctive relief, compensatory damages, punitive damages, and reinstatement. See 42 U.S.C. §§ 2000e-16(a)-(e); 2000e-5(f)-5(k); and 1981a(a)(2). Given the dissimilarities of the relief available under the two statutes, it is evident that the FECA is ill-equipped to provide make whole relief to employees who suffer from discrimination.

Further, a review of the legislative history contained in 1949 U.S.C.C.A.N. 2136, 2143 indicates that the FECA was intended to compensate employees who suffer work-related injuries and immunize employers from tort actions for the same injuries. It appears that FECA's exclusivity provision must be read as foreclosing an employee who elects to receive FECA benefits from also bringing a tort action against the employer under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, etc.

Lastly, it is not enough to say that the Postal Service complied with its FECA obligations and can now feel free to discriminate against Ms. Meester. It is important to note that the FECA obligations are a bare minimum standard. Whereas, the Rehabilitation Act requires an affirmative duty on behalf of the United States Postal Service in accommodating its employees who are individuals with handicaps. 29 U.S.C. § 791. Quite frankly, the

United States Postal Service's compliance with the bare minimum standard of the FECA has no bearing on the question of whether the United States Postal Service must reasonably accommodate Ms. Meester's disability. As stated by the Honorable Circuit Judge Heaney, in his dissent in the United States Court of Appeals for the Eighth Circuit's decision in this case, "the majority eviscerates the Rehabilitation Act by denying its protection to disabled employees–clearly the intended beneficiaries of the Act. In attempting to clarify the boundaries of two statutes dealing with reasonable accommodation, the majority exalts FECA, clearly a tort surrogate, to supplant the broad remedial purposes of the Rehabilitation Act. The mischief done today can only be undone by Congress, our court en banc, or the United States Supreme Court." (App. 18-19.)

B. Important Federal Question - Rule 10(c)

With regard to Ms. Meester's second issue of whether she should have been allowed to seek exemplary damages against the United States Postal Service, the majority of the United States Court of Appeals for the Eighth Circuit stated, "that it carefully reviewed the argument and found it to be without merit". (App. 7-8.) Lacking, however, from the decision is a discussion of the decision for Baker v. Runyon, 922 F. Supp. 1296 (N.D. Ill. 1996), which has since been overturned by the Seventh Circuit in Baker v. Runyon, 114 F.3d 668 (1997).

The United States District Court for the Northern District of Illinois in the Baker case, correctly found that the United States Postal Service is subject to a "sue-and-be-sued" clause, in that Congress intended that the United States Postal Service be run more like a business than its predecessor, the Post Office Department. 922 F. Supp. at 1297-1298 (citing to Loeffler v. Frank, 486 U.S. 549, 556 (1988)). Congress saw to it that the United States Postal Service cast

off its cloak of sovereignty and assume the status of a commercial enterprise. Id. at 1298 (citing to Loeffler at 565). As a result, punitive damages were allowed against the United States Postal Service as they were allowed against any private commercial enterpise. Id. The United States District Court for the Northern District of New York has also agreed that punitive damages are allowed against the United States Postal Service in Ausfeldt v. Runyon, 950 F. Supp. 478, 487 (N.D.N.Y. 1997).

Because of the clear conflict of lower court decisions on both issues, a decision by this Court is needed to resolve the conflict. Further, both issues involve important federal questions that need clarification to provide full and complete remedies to injured federal workers. A decision by this Court will provide a final resolution to issues that are split in the United States District Courts throughout the United States of America and the United States Courts of Appeals and carry out the clear intent of Congress in providing remedies for injured federal workers..

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: December 21, 1998

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UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 97-1580NDF

Marjorie A. Meester,	*	
	*	Order Denying Petition
Appellant,	*	For Rehearing and
	*	Suggestion for
v.	*	Rehearing En Banc
	*	
Marvin T. Runyon,	*	
Postmaster General, United	*	
States Postal Service,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion.

The petition for rehearing by the panel is also denied.

September 29, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1580

Marjorie A. Meester,	*
	*
Appellant,	*
	*
v.	*
	*
Marvin T. Runyon,	*
Postmaster General, United	*
States Postal Service,	*
	*
Appellee.	*

Submitted: March 12, 1998
Filed: July 16, 1998

Before BEAM and HEANEY, Circuit Judges, and KOPF[1], District Judge.

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

BEAM, Circuit Judge.

After an adverse jury verdict on her Rehabilitation Act claim, Marjorie A. Meester appeals, claiming the district court[2] erred in, among other things, granting her employer's motion for partial summary judgment before trial. We affirm.

I. BACKGROUND

Meester, a long-term employee of the United States Postal Service, developed work-related chronic tendinitis. This condition eventually developed into carpal tunnel syndrome, requiring surgery. Meester filed workers' compensation claims for these injuries under the Federal Employees' Compensation Act (FECA). See 5 U.S.C. §§ 8101-8193. The Department of Labor, which administers FECA, see 5 U.S.C. § 8145, awarded Meester benefits under the Act.

In addition to providing certain compensatory benefits, FECA requires federal employers to allow injured employees to return to their old positions or, if they can no longer perform their original duties, to offer them reasonable alternative positions. See 5 U.S.C. § 8151(b); 20 C.F.R. § 10.123(d).

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2 The Honorable Karen K. Klein, United States Magistrate Judge for the District of North Dakota, presiding by consent of the parties. See 28 U.S.C. § 636(c).

Meester suffered from a partial permanent impairment affecting twenty-five percent of her upper extremities, and could not perform her old job. The Postal Service therefore offered to create several different limited duty positions for Meester, all of which she rejected as beyond her limitations. Meester's doctor eventually approved one of the proposed positions which provided two non-consecutive days off per week. The doctor informed the Postal Service that it would be "helpful" if Meester could have two consecutive days off. The Postal Service responded that because Mondays and Saturdays are its busiest days, it could not grant this request. Of the more than seventy employees who work at the same post office as Meester, only five routinely have Saturday and Sunday off. After reviewing the proposed position, Meester's medical records, and her doctor's recommendations, the Department of Labor concluded that the proposed position was fully consistent with Meester's physical limitations. It therefore directed Meester to accept the position or lose her FECA benefits. Meester returned to work, but continued to maintain that the job was not sufficiently accommodating of her injuries. She asserted that the position was inappropriate because it did not provide two consecutive days off or sufficient rest time.

Meester eventually filed suit claiming that the Postal Service had violated the Rehabilitation Act, 29 U.S.C. § 794(a), by (1) treating her unfavorably because of her disabled status; (2) failing to adequately accommodate her disability; and (3) harassing and retaliating against her. The Postal Service moved for summary judgment. The district court initially denied the motion, but upon reconsideration granted summary judgment to the Postal Service on the accommodation claim. The court reasoned that because Meester had received this position as part

of her FECA claim, her only remedy as to disputes about the nature of the job was under FECA. The disparate treatment and retaliation claims proceeded to trial. After Meester had presented her case-in-chief, the district court granted the Postal Service judgment as a matter of law on the retaliation claims. The disparate treatment claim was submitted to the jury, which returned a verdict for the Postal Service. Meester appeals.

II DISCUSSION

Meester argues that the district court erred in granting the Postal Service summary judgment on her failure to accommodate claim. We review a district court's grant of summary judgment de novo. See Lang v. Star Herald, 107 F.3d 1308, 1311 (8th Cir.), cert. denied, 118 S. Court. 114 (1997). Summary judgment is proper if, taking all facts and reasonable inferences from those facts in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. Id.; see also Fed. R. Civ. P. 56(c).

FECA is the exclusive remedy for workplace injuries suffered by federal employees. See 5 U.S.C. § 8116(c). Several courts have held, however, that this workers' compensation statute does not bar federal employees from suing their employers under the anti-discrimination laws. See, e.g., Miller v. Bolger, 802 F.2d 660 (3d Cir. 1986) (Title VII claim not barred by FECA); Callanan v. Runyun, 903 F. Supp. 1285, 1296 (D. Minn. 1994) (Postal Service employee not precluded by FECA from suing under Title VII), aff'd on other grounds, 75 F.3d 1293 (8th Cir. 1996). Meester asserts that the district court departed from this line of cases and held that FECA

precludes federal employees from suing under the Rehabilitation Act. Meester mischaracterizes the district court's ruling. The court did not hold that all discrimination claims are barred under FECA; indeed, it allowed her disparate treatment and retaliation claims to proceed to trial. Rather, the district court held that Meester's unique failure to accommodate claim was barred by FECA. We are convinced that this ruling was correct.[3]

Meester is not claiming that she could perform her old job with reasonable accommodation. Instead, she seeks accommodations in performing the alternative position she was awarded under FECA. The Department of Labor is charged with determining whether an alternative position offered under FECA constitutes "suitable work." 5 U.S.C. § 8106(c). The Department, acting pursuant to that authority, reviewed the alternative position proposed by the Postal Service and concluded it was within Meester's abilities. Meester is essentially asking us to hold that the Department of Labor was wrong in directing her to accept this position. Such a holding would contravene FECA's prohibition against judicial review of compensation decisions. See 5 U.S.C. § 8128; Brumley v. United States Dep't of Labor, 28 F.3d 746, 747 (8th Cir. 1994) (holding that Congress intended to bar judicial review of FECA

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The dissent either misconstrues or misunderstands the limited breadth and depth of both the district court's opinion and today's holding. Therefore, it is virtually impossible to respond concisely and with precision. Lacking the common ground necessary to formulate a focused discussion, we do not attempt a reply.

decisions altogether). We will not allow Meester to use the Rehabilitation Act to circumvent Congress's intent. If Meester's current position is not "suitable work," her remedy is in an appeal of the Department's decision under the statute. See 5 U.S.C. § 8124.

Thus, we hold that a frustrated FECA claimant cannot secure judicial review of a FECA compensation decision by claiming that the Rehabilitation Act entitles her to accommodation in performing an alternative position approved by the Department of Labor when the claim is predicted upon the same illness or injury that gave rise to the Department of Labor's initial decision. Our decision is consistent with the opinions of other courts that have been confronted with this type of claim. See, e.g., Stubler v. Runyon, 892 F.Supp. 228, 229-30 (W.D. Mo. 1994), aff'd, 56 F.3d 69 (8th Cir. 1995) (unpublished table decision); Alexander v. Frank, 777 F. Supp. 516, 523-24 (N.D. Tex. 1991); see also, Reidy v. Runyon, 971 F. Supp. 760, 771 (E.D.N.Y. 1997) (distinguishing Stubler on ground that Reidy's disability discrimination claim was not strictly related to his original injury).

Meester also claims that the district court's grant of judgment as a matter of law to the Postal Service on her retaliation claims was error. We have painstakingly reviewed Meester's arguments, the trial transcripts, and the district court's ruling, and are convinced that the district court did not err.

Finally, Meester alleges numerous errors regarding her disparate treatment claim, from the district court's denial of leave for Meester to amend her complaint to its denial of her post-trial motion for judgment as a matter of law. We have carefully reviewed each of Meester's arguments and find them

to be without merit.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

HEANEY, Circuit Judge, dissenting.

From this day forward, employees receiving FECA benefits for work-related injuries are no longer entitled to full protection under the Rehabilitation Act. I disagree with the majority's conclusion that employers may engage in otherwise prohibited discrimination against employees receiving FECA benefits because nothing in FECA nor the Rehabilitation Act supports the majority's position that FECA's exclusivity provision bars suit under the Rehabilitation Act. Accordingly, I dissent.

The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be . . . subjected to discrimination . . . by the United States Postal Service." 29 U.S.C. § 794(a). A "[q]ualified individual with a" disability is one "who, with or without reasonable accommodation, can perform the essential functions of the [employment] position in question." 29 U.S.C. § 1615.203(a)(6).

Prohibited discrimination under the Rehabilitation Act includes an employer's failure to make "reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an . . . employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the

operation of the business." 42 U.S.C. § 12112(5)(A).[4] A "reasonable accommodation" may include-(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . ., and other similar accommodations for individuals with disabilities." Id. § 12111(9)(B).

The Rehabilitation Act prohibits discrimination, which includes an employer's refusal reasonably to accommodate an employee's disability. Rather than barring accommodation claims under the Rehabilitation Act, FECA compensates employees for work-related injuries and indemnifies the United States against actions in tort for those injuries. For example, in Callanan v. Runyun, 903 F. Supp. 1285 (D. Minn. 1994), aff'd 75 F.3d 1293 (8th Cir. 1996), a Postal Service employee sued the Postmaster under Title VII for sexual harassment, discrimination, and retaliation. Even though Title VII discrimination claims generally involve distinct factual scenarios than those presented in Rehabilitation Act claims, the conclusion that FECA does not preclude recovery under Title VII specifically, and the anti-discrimination statutes generally, is equally applicable to the Rehabilitation Act. In Callanan, the district court held that the receipt of FECA benefits did not bar

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Whether a violation of the Rehabilitation Act has occurred is determined by using the same standards as are applied for an Americans with Disabilities Act (ADA) claim, 42 U.S.C. §§ 12111-12117, 12201-12204, and 12210. See 29 U.S.C. §§ 791(g), 794(d).

recovery for discrimination. Id. at 1296. In reaching its conclusion, the district court cited several federal decisions for support. Id.; see, e.g., Miller v. Bolger, 802 F.2d 660, 663, 664 (3d Cir. 1986) ("FECA was intended only to be a substitute for suits against the United States for tortious injury" and nowhere in legislative history "is there any mention of FECA recovery as precluding actions for discrimination"); Eckley v. Bentsen, 1994 WL 114646 at *7 (D.D.C. 1994) (FECA and Title VII each create "separate remedies for distinct types of injuries"); Nichols v. Frank, 771 F. Supp. 1075, 1079 (D.Or. 1991) (FECA does not bar recovery under Title VII where there is no double recovery); Gergick v. Austin, 764 F. Supp. 580, 581 (W.D. Mo. 1991) (FECA is exclusive remedy for work-related personal injuries and is not a bar to recovery for injuries due to discrimination); Johnson v. Sullivan, 764 F. Supp. 1053, 1063 (D. Md. 1991) (Title VII and Rehabilitation Act claims are not barred by receipt of FECA benefits); George v. Frank, 761 F. Supp. 256, 269 (S.D.N.Y. 1991) ("FECA coverage, which is most commonly associated with work-related accidents and diseases, clearly fails to preclude [plaintiff's] request to pursue her discrimination claim under the umbrella of equitable remedies available under Title VII") (emphasis in original); Sullivan v. United States, 428 F. Supp. 79, 81 (E.D. Wis. 1977) (Compensable injuries covered by FECA includes injury by accident and disease, not claims for discrimination or mental distress); see also Nichols v. Frank, 42 F.3d 503, 515 (9th Cir. 1994) ("FECA's exclusivity provisions apply only to additional payments for work-related injuries"); Reidy v. Runyon, 971 F. Supp. 760, 769-71 (E.D.N.Y. 1997) (receipt of FECA benefits does not preclude recovery under the Rehabilitation Act because statutes not mutually exclusive); Taylor v. Secretary of

Navy, 852 F. Supp. 343, 351-53 (E.D. Pa. 1994) (FECA benefits do not preclude recovery under Rehabilitation Act), aff'd Taylor v. Dalton, 61 F.3d 896 (3d Cir. 1995) (unpublished table decision).

The majority fails to account for the fact that FECA and the Rehabilitation Act provide significantly different remedies. Instead, it clings to a mechanical application of FECA's exclusivity provision and erroneously concludes that it bars suit under the Rehabilitation Act. Under FECA, a claimant is entitled to recover lost wages and medical costs incurred as a result of on-the-job injuries. See Miller v. Bolger, 802 F.2d at 662 (citing 5 U.S.C. §§ 8102(a), 8103(a), 8105, 8106). Thus, much like private worker's compensation statutes, FECA was designed to compensate employees for work-related injuries and to indemnify their employers against actions in tort for those injuries. The Rehabilitation Act, however, concerns itself with employment discrimination and provides a claimant with back pay, front pay, attorney's fees, injunctive relief, compensatory damages, and reinstatement.[5] See 42 U.S.C. §§

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The Miller court was confronted with the argument that the receipt of FECA benefits precluded relief under Title VII. See Miller, 802 F.2d at 663. The Miller court was persuaded by the significantly different remedies provided by FECA and the Rehabilitation Act. It reasoned that if FECA were the exclusive remedy for an employer's discrimination against an employee who received FECA benefits, plaintiffs could not be made whole. Id. at 665-66. Even though the Miller court recognized that FECA and an employment anti-discrimination statute like Title VII have the possibility of "overlapping" because both statutes apply in the employment

2000e-16(a)-(e); 2000e-5(f)-5(k); and 1981a(a)(1)-(a)(d). It is evident from the different remedial schemes that FECA is ill-equipped to make whole employees who suffer discrimination.

In addition to the difference in remedial schemes, the conclusion that FECA, rather than acting as a bar to recovery under the Rehabilitation Act, simply compensates employees for work-related injuries and indemnifies the United States against actions in tort is further bolstered by FECA's legislative history.

> Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause

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context, it noted that there was no fear of double recovery. Id. at 666 n.5 (citing 5 U.S.C. §§ 8183, 8132; 42 U.S.C. § 2000e-5(g)). Similarly, there is no fear of double recovery in this case. Even if there were, the district court is fully capable of fashioning appropriate relief.

> federal employees to seek relief under these general statutes. Similarly, corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits by employees against such instrumentalities based upon accidents in employment.
>
> This situation has been of considerable concern to all Government Agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford employees and their dependents a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries and the Government.
>
> The saving to the Government by the elimination of costly and needless claims and litigation under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, and the like, which presently weigh heavily upon the Government and involve considerable expense to defend will be eliminated, offsetting in substantial part the increased cost in compensation benefits.

S. Rep. No. 81-836, 81st Cong., 1st Sess., reprinted in 1949 U.S.C.C.A.N. 2136, 2143 (emphasis added).

The legislative history indicates that FECA was intended to compensate employees who suffer work-related injuries and immunize employers from actions in tort for those same injuries similar to private workers' compensation statutes. A private employer's compliance with its workers' compensation obligations does not immunize it from Rehabilitation Act liability. Similarly, FECA's exclusivity

provision must be read as foreclosing an employee who elects to receive FECA benefits from also bringing an action against her employer under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, etc. Congress has not amended FECA to state otherwise, nor has it limited Rehabilitation Act claims in the manner suggested by the majority.

According to the majority, if Meester seeks reasonable accommodations for her modified-duty position, her sole recourse it to apply to the Department of Labor (Department) for a re-evaluation of her FECA benefits. I disagree. While it is possible that Meester could pursue a modification to her duties under FECA, that option is singularly unattractive.[6] If Meester applied to the Department for a modification to her duties, I envision at least two scenarios. First, the Department could determine that Meester's current position is consistent with her medical condition. Meester could not appeal this determination. She would then be forced to continue in her present position or the Department could terminate her benefits–leaving her jobless. Second, the Department could determine that Meester is no longer able to work in her present capacity and is entitled to FECA benefits. At that point, the Postal Service could determine that rather than pay these

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Had there been a trial in this case, it may have been that the accommodations Meester requests are unreasonable or constitute an undue burded to the Postal Service. Given the posture of this case, however, the reasonableness of Meester's requested accommodations is irrelevant.

benefits, it would further modify her position. Notably, the Postal Service would have sole discretion in determining the modifications it would offer. Also, the Department would lack the authority to order the Postal Service to make any modifications to her duties. Moreover, if the Postal Service determined that no further modifications could be made, neither the Department nor the courts could review that determination. Because nothing in either statute suggests that the receipt of FECA benefits exempts covered employers from compliance with the Rehabilitation Act, I cannot agree with the majority that this would have been Meester's only recourse.[7]

Having concluded that FECA's exclusivity provision does not bar suit under the Rehabilitation Act, I believe that Rehabilitation Act analysis requires the use of Meester's post-injury position as her "position in question." Meester claims that she has suffered emotional injuries and that her condition has deteriorated as a result of the Postal Service's failure to provide her with proper rest breaks and two consecutive days off. Meester also claims that she has had to take vacation and sick leave to allow her time to recuperate from the fatigue

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I am not persuaded that only accommodation claims, as opposed to other discrimination claims, would be barred by the receipt of FECA benefits. The Rehabilitation Act prohibits discrimination, which it defines, in part, as an employer's refusal to grant a disabled employee reasonable accommodations. Neither FECA nor the Rehabilitation Act suggests that one of the various forms of prohibited discrimination–here, failure to accommodate–can only be redressed under FECA.

associated with her duties and the Postal Service's failure to grant her requested accommodations. I assume, as we must on appeal from an adverse grant of summary judgment, that these claims are true.

FECA defines an injury which, for the purposes of this case, is an "injury by accident." 5 U.S.C. § 8101(5). While FECA does not define disability, it expressly anticipates that injured employees will suffer a disability. For example, 5 U.S.C. § 8103(a) provides that the United States shall furnish to the employee "the services, appliances, and supplies . . . which the Secretary of Labor considers likely to . . . reduce the degree or the period of disability." Id. (emphasis added). Title 5 U.S.C. § 8106 anticipates the fact that an employee will suffer a permanent partial disability such as that suffered by Meester and provides a compensation schedule accordingly. Id. Finally, the regulations expressly anticipate that a partially disabled employee will return to work and "perform restricted or limited duties." 20 C.F.R. § 10.123(c)(2).

If Meester's pre-injury position were the "position in question" for the purposes of Rehabilitation Act analysis, an employee disabled by a work-related injury could never enjoy Rehabilitation Act protection if she continued to work for the same employer.[8] FECA, not the Rehabilitation Act, obligates

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[8] In holding the FECA barred Meester's recovery under the Rehabilitation Act, the magistrate principally relied on Stubler v. Runyon, 892 F. Supp. 228 (W.C. Mo. 1994, aff'd, 56 F.3d 69 (8th Cir. 1995) (unpublished table decision). In Stubler, the district court granted the Postmaster's motion for summary judgment as a matter of law after a jury had returned its verdict in favor of the plaintiff. Stubler, 892 F.

an employer to create a modified-duty position for an injured employee where appropriate. Certainly, once the Postal Service modified Meester's position, it was not then free to discriminate against her. In this regard, the Postal Service's argument is similar to that made by the Navy in Taylor v. Garrett, III, 820 F. Supp. 933, 936 (E.D. Pa. 1993).

In Taylor, a naval employee was injured and no longer able to perform his pre-injury duties. Id. The employee, after being fired, brought a claim under the Rehabilitation Act. Id. In response to the Navy's argument that the relevant "position in question" was the pre-injury position, the court stated:

> If one were to accept the Navy's rigid definition of the "position in question," an employer who chose to reassign to light-duty work an employee who had become unable to perform his original job would have an unsettling "carte blanche" power over that employee. During the course of the handicapped worker's light-duty employment, the employer would be able, without any sanction under the Rehabilitation Act, to harass that worker because of his handicap, fail reasonably to accommodate that worker's disability, or otherwise

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Supp. at 229. After hearing all of the evidence, the district court held that the plaintiff's Rehabilitation Act claim was barred by the receipt of FECA benefits. Id. Even if Stubler were controlling in this circuit, it is not applicable to the instant case. In fact, the district court in Stubler anticipated the present case by including the following language: "This is not to say, however, that an employee injured on duty never can be 'handicapped' as a consequence of the injury." Id. at 229.

> engage in handicap-based discrimination simply because the employee was not "qualified" for a position that had nothing to do with his current work.

Id. at 939. Similarly, I fear that the majority's opinion enables employers to harass disabled employees, fails to reasonably accommodate them, or engage in otherwise discriminatory behavior simply because they receive FECA benefits.

The majority misinterprets Meester's alleged injury. Meester contends that the Postal Service failed reasonably to accommodate her disability. Simply because her claim is supported by the allegation that her medical condition is deteriorating and that she is suffering from emotional distress because the Postal Service failed to accommodate her, does not convert her claim into an "injury" under FECA. The statutes are not exclusive, and while there may be some overlap in Meester's ability to receive an accommodation, it is not enough to say that the Postal Service complied with its FECA obligations and can now feel free to discriminate against Meester. Quite simply, the Postal Service's compliance with FECA in creating a limited-duty position for an employee who suffered work-related injuries has no bearing on the question of whether the Postal Service must reasonably accommodate the disability of an employee.

Today, the majority eviscerates the Rehabilitation Act by denying its protection to disabled employees–clearly the intended beneficiaries of the act. In attempting to clarify the boundaries of two statutes dealing with reasonable accommodation, the majority exalts FECA, clearly a tort surrogate, to supplant the broad remedial purposes of the Rehabilitation Act. The mischief done today can only be

undone by Congress, our court en banc, or the United States Supreme Court. For the reasons discussed above, I dissent.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHT CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Marjorie A. Meester,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. A3-94-44
	)	
Marvin T. Runyon,	)	
Postmaster General,	)	
United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

The plaintiff in this matter has moved this court to enter judgment as a matter of law overturning the jury's verdict. (doc. # 152). In the alternative, the plaintiff has requested the court to vacate the jury's verdict and order a new trial. Id.

After reviewing the plaintiff's submissions and the court's own trial notes, the court finds that there was adequate evidence presented at trial to support the jury's conclusion.[1]

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[1] The court also does not accept Meester's characterization of both Bolme's and Joan Marshall's testimony as the only interpretation of what was actually stated by these witnesses at trial. However, because the court

For example, one of the United States Postal Service's stated explanations for not allowing Marjorie Meester to have a full-time regular position with two consecutive days off was based on business reasons. Specifically, Richard Bolme repeatedly testified that Marjorie Meester was not given Saturdays off because he could best use Meester's capabilities on Saturdays. This explanation alone provides the USPS with a nondiscriminatory reason for its actions. Meester disputed Bolme's explanation, but the jury found in favor of the USPS. When considering a motion for ordering judgment as a matter of law, the court must "assume that all conflicts in the evidence were resolved in favor of the prevailing party. . . ." Toombs v. Bell, 915 F.2d 345, 348-49 (8th Cir. 1990). Although the USPS has proffered other persuasive arguments in support of the jury's verdict, the court considers Bolme's testimony sufficient to support the jury's verdict. Therefore, the court will not discuss each of the USPS's arguments in favor of the jury's verdict. Accordingly, the court rules that Meester's motion for judgment as a matter of law must fail.

With regard to Meester's motion for a new trial, the court similarly finds that Meester's motion must fail. When considering whether to grant a motion for a new trial, the court must determine whether "a miscarriage of justice has occurred." King v. Davis, 980 F.2d 1236, 1237 (8th Cir. 1992). For the reasons stated in the preceding paragraph, the court finds that the jury's conclusions were based on sound and reasonable

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finds adequate reasons for denying Meester's motion, the court will not restate the USPS's interpretation of trial testimony, which the court considers, at least, equally persuasive as Meester's interpretation.

interpretations of the evidence. Accordingly, the court finds that a miscarriage of justice has not occurred and, therefore, denies Meester's motion.

IT IS ORDERED:

1. Plaintiff's motion for judgment as a matter of law (doc. #152) is denied.
2. Plaintiff's motion for a new trial (doc #152) is denied.

Dated: December 31, 1996

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge

UNITED STATES DISTRICT COURT

District of North Dakota - Southeastern Division

Marjorie A. Meester

v.

JUDGMENT IN A CIVIL CASE

Postal Service, U.S., Marvin T. Runyon, Postmaster General

Case Number: A3-94-44

x **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

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IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the defendant for dismissal of plaintiff's complaint and cause of action.

October 7, 1996
Date

Edward J. Klecker
Clerk

/s/ Sheila M. Beauchene
By Deputy Clerk,
Sheila M. Beauchene

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Marjorie A. Meester,	)	
	)	
Plaintiff,	)	
	)	Civil No. A3-93-80
v.	)	
	)	
Marvin T. Runyon,	)	
Postmaster General,	)	
United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff Marjorie Meester is a clerk with the United States Postal Service and is assigned to the Prairiewood Station in Fargo, North Dakota. During the years 1988-90, Meester was diagnosed with both tendinitis and carpal tunnel syndrome. Meester filed claims for worker's compensation benefits under the Federal Employees Compensation Act (FECA) for both afflictions. The Secretary of Labor granted both of Meester's claims.

In 1994, Meester brought this civil action pursuant to the Rehabilitation Act, 29 U.S.C. §§ 791 794(a) (1988). Meester alleges that the United States Postal Service's (USPS) failure to adjust her work schedule to allow her two consecutive "days off," in order to accommodate her work-related injury,

constitutes handicap discrimination. Meester also alleges that because of her work-related injury, the USPS has harassed and retaliated against her with respect to her efforts to obtain worker's compensation benefits from the Department of Labor. Meester seeks injunctive relief, compensatory relief, and back pay. The USPS denies all of Meester's contentions. The USPS claims that it has "reasonably accommodated" Meester's handicap and is therefore in full compliance with the requirements of the Rehabilitation Act.

Currently before the court is the USPS's motion for summary judgment.[1] The USPS makes two arguments supporting is summary judgment motion: 1) that as a matter of law, the USPS has made "good faith" efforts to reasonably accommodate Meester's disability; and 2) that Meester's previous recovery of FECA benefits precludes her present claim under the Rehabilitation Act.[2] For the reasons set forth in this

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1 The USPS phrased its motion in the alternative–either for dismissal for failure to state a claim or, alternatively, for summary judgment. This court will consider the present motion as a motion for summary judgment since both parties submitted evidence which was outside the pleadings. See George v. City of St. Louis, 26 F.3d 55, 57 (8th Cir. 1994).

2 In a footnote, the USPS also claims the defense of having made an offer for "full relief." If a claimant rejects an offer of "full relief" during an administrative proceedings, then that claimant cannot bring a lawsuit in federal court. Frye v. Aspin, 997 F.2d 426, 428 (8th Cir. 1993). However, "in a handicap discrimination case . . ., [the offer] must include a 'reasonable accommodation' for the complainant's

memorandum, the court denies the USPS's motion.

SUMMARY JUDGMENT

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "A dispute is genuine when 'the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" Westchem Agr. Chemicals, Inc. v. Ford Motor Co., 990 F.2d 426, 429 (8th Cir. 1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Rule 56 of the Federal Rules of Civil Procedure "mandates the entry of summary judgment . . . against a party failing to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex, 477 U.S. at 322. The court considering a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party who enjoys "the benefit of all reasonable inferences to be drawn from the facts." Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337, 1339 (8th Cir. 1989) (citation omitted). Summary judgment is improper if the court finds a genuine issue of material fact; however, "the mere existence of some alleged factual dispute between the parties

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handicap." See Gardner v. Morris, 752 F.2d at 1280; 29 C.F.R. § 1613.704. Because a reasonable jury could find that Meester's requested accommodation was "reasonable" and yet was not offered by the USPS, this court concludes that the USPS cannot show, as a matter of law, that Meester rejected an offer of "full relief."

will not defeat an otherwise properly supported motion for summary judgment . . ." Commercial Union Ins. Co. v. Schmidt, 967 F.2d 270, 271-72 (8th Cir. 1992) (citation omitted). The issue is whether the evidence submitted presents a sufficient disagreement about the material facts so that submission to a jury is required, or whether the evidence is so one-sided that a party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

"GOOD FAITH" EFFORTS TO REASONABLY ACCOMMODATE

The USPS claims that it has made "good faith" efforts to accommodate Meester's physical condition. Consequently, the USPS argues, pursuant to the Rehabilitation Act, Meester should not be allowed a jury trial or to recover compensatory damages.[3]

3

The Rehabilitation Act of 1973 prohibits discrimination on the basis of a "handicap" by federal employers such as the USPS. 29 U.S.C.A. § 794 (1994). Moreover, under the Rehabilitation Act, federal employers have a duty to take affirmative steps to provide "reasonable accommodations" so that a handicapped individual has equal access to employment opportunities in the federal government. 29 U.S.C.A. § 791 (1994). However, if an employer has failed to provide a reasonable accommodation, the employer can still avoid compensatory damages and a jury trial by showing that it has made a "good faith" effort to accommodate the handicap. 42 U.S.C.A. § 1981(a)(2) & (3) (1994). However, a "good faith" effort to accommodate would not bar the type of injunctive relief that Meester is

The USPS asserts that, notwithstanding its refusal to grant Meester two consecutive days off,[4] it has already gone to significant lengths to accommodate Meester's handicap. This court does note that the USPS has made several attempts to provide a job description that would satisfy Meester. However, there is also evidence that arguably suggests that some of the USPS's efforts to redefine Meester's job description may have been aimed at harassing Meester rather than accommodating her handicap. For example, Meester's treating physician, Dr. Gregory G. Orson, stated that postal officials, when designing Meester's job description, did not follow his "instructions or recommendations pertaining to Mrs. Meester's ability to perform certain tasks." Affidavit of Gregory G. Orson, at Doc. #23. In fact, Dr. Orson states:

> On a number of occasions, even after I had given my objections to certain tasks being ask (sic) to perform by Mrs. Meester, the Postal Service would issue a substantially similar job offer knowing that she was unable to perform those tasks.

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currently seeking. Id. Specifically, Meester seeks, as a "reasonable accommodation," the alteration of her current work schedule to allow her two consecutive "days off," specifically Saturdays and Sundays.

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A modified work schedule is one of many types of accommodations that the Rehabilitation Act recognizes as a "reasonable accommodation." 42 U.S.C.A. § 12111 (9) (B) (1994). Therefore, the type of accommodation that Meester seeks is allowable under the Act.

Id. Dr. Orson's statements and the testimony of the plaintiff create an issue of fact as to whether the USPS made a "good faith" effort to redefine Meester's job description in a way that would accommodate her handicap.[5]

Furthermore, this court finds that the USPS's refusal of Meester's requested accommodation, to not work on Saturdays and Sundays, could also lead to a conclusion that the USPS has not acted in "good faith." In Howell v. Michelin Tire Corp., the court ruled that an employer's failure to provide a reasonable accommodation to a handicapped employee is probative of a lack of "good faith" on the part of the employer. Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1493 (M.D. Ala 1994).

Meester's physician, Dr. Orson, stated on two occasions that she would do "much better" with two consecutive days off. Because the post office is closed on Sundays, two consecutive days off would essentially mean Saturdays and Sundays. Dr. Orson's statement could arguably be interpreted either that Meester does need two consecutive days off, or that she does not really need such an accommodation but it would be better for her to have it. In light of the ambiguous nature of Dr. Orson's statement, the USPS's refusal to grant her requested accommodation of Saturday and Sundays off seems understandable to the court. However, the reasonableness of the USPS's reaction to Dr. Orson's comment is a question of

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5 Meester at this time seems to agree that she is able to perform the tasks now assigned to her, although she complains about the reluctance of the USPS to reach the present level of accommodation. Her present request for further accommodation involves only consecutive days off.

fact relevant not only to whether it has reasonably accommodated Meester's handicap, but also whether it has exercised good faith in attempting to do so.

The USPS explains further that it has not granted Meester's request for two consecutive "days off" because doing so would create an "undue burden" on the operations at Prairiewood. In support of its position, the USPS cites section 12111(9) of the Rehabilitation Act which states that employers are not required to provide accommodations that would cause an "undue burden" on the business. 42 U.S.C.A. § 12111(9); 29 C.F.R. § 1630.2(o) (1994).[6] The USPS argues that Saturdays are the busiest day of the week and the post office needs Meester to perform her duties on that day. Also, Richard Bolme, Meester's supervisor, testified in his deposition that "it would impose an undue hardship on the Postal Service to accede to [Meester]'s request." Brief in Support of Defendant's Motion for Summary Judgment at 6, Doc. #17 (citing the deposition of Richard M. Bolme).

Meester counters that the USPS would not experience an "undue burden" if it granted her requested accommodation. In support of her argument, Meester cites the affidavit testimony of Jeremy Cahill, President of the local affiliate of the American Postal Workers Union. Cahill states:

Scheduling Marjorie Meester . . . Monday through

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In determining whether a requested accommodation would create an "undue burden," the Rehabilitation Act directs courts to consider, inter alia, the "impact . . . of such accommodation upon the operation of the facility." 5 U.S.C.A. § 8101 (10)(B)(ii) (1994).

> Friday would not impose an undue burden upon the post office... All part-time employees utilized by the Postal Service could be trained to perform Marjorie Meester's tasks on Saturday and Sundays, if necessary.

Id. Furthermore, according to Cahill, all other full-time regular employees[7] at the postal office where Meester works have both Saturdays and Sundays off. Id. The extent and origin of Cahill's knowledge concerning the feasibility of Meester's requested accommodation are unknown. However, because the USPS has not disputed Cahill's personal knowledge to testify to these facts, this court can only conclude that Cahill's testimony, if believed, could lead to a finding that granting Meester two consecutive "days off" would not have created an "undue burden." In such case, the USPS's failure to provide a "reasonable accommodation" would be probative of the USPS's lack of "good faith" in its attempt to accommodate Meester. See Howell, 860 F. Supp. at 1493. The court, when considering a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party, who enjoys "the benefit of all reasonable inferences to be drawn from the facts." Vacca, 875 F.2d at 1339 (citation omitted). In light of the testimony from Dr. Orson and Jeremy Cahill, this court finds

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7 Meester raises an issue about entitlement to conversion to full-time regular status. The USPS argues that Meester conceded in her deposition testimony that the conversion issue is an administrative matter rather than an issue in this lawsuit. Meester's counsel, however, still argues the issue in his brief as an indication of lack of "good faith."

that whether the USPS has made a "good faith" attempt to reasonably accommodate Meester is a material fact over which reasonable minds could differ. Even though the USPS has come very close to satisfying its burden, the court concludes that on the present record the USPS has not fully shown, as a matter of law, that it has engaged in "good faith efforts to accommodate Meester's disability. Consequently, Meester has a colorable claim for compensatory damages and therefore is entitled to a jury trial.

FECA RECOVERY BARS FURTHER RECOVERY UNDER THE REHABILITATION ACT

The USPS's second argument supporting summary judgment is that Meester's prior recovery of disability benefits under the Federal Employee's Compensation Act (FECA) bars her present claim for redress under the Rehabilitation Act. The FECA states in relevant part:

> the liability of the United States or an instrumentality thereof under this subchapter . . .is exclusive and instead of all other liability of the United States or the instrumentality to the employee . . . because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, . . . or judicial proceeding under a workmen's compensation statute or under a federal tort liability statute.

5 U.S.C. § 8116(c) (1990) (emphasis added). The USPS asserts that the FECA provides the exclusive remedy for on-the-job injuries sustained by federal employees. Accordingly, the

USPS argues Meester's discrimination claim under the Rehabilitation Act should be barred by her prior recovery under the FECA.

This court notes that there is no reported precedent on this precise issue. However, the federal circuits who have considered this issue with respect to other antidiscrimination statutes have ruled that recovery under the FECA does not bar a subsequent discrimination claim. In Miller v. Bolger, the Third Circuit ruled that the FECA does not bar recovery under Title VII despite the fact that the claimant has already received benefits under the FECA for some of those injuries. Miller v. Bolger, 802 F.2d 660, 662 (3d Cir. 1986); See also Sullivan v. United States, 428 F. Supp. 79 (E.D. Wisc. 1977) (ruling that a discrimination claim is not barred by a previous FECA recovery). The Miller court reasoned that Congress intended the FECA to be "a substitute" for only those claims brought pursuant to federal tort statutes such as the Federal Torts Claims Act, the Admiralty Act, and the Public Vessels Act. Miller, 802 F.2d at 663. However, the Third Circuit further opined that the FECA was not intended to "exclude liability under a federal discrimination statute . . ." Id. at 662.

Similarly, in DeFord v. Secretary of Labor, the Sixth Circuit ruled that the FECA does not bar a discrimination claim brought pursuant to the Energy Reorganization Act. DeFord v. Secretary of Labor, 700 F.2d 281, 289-90 (6th Cir. 1983). The Sixth Circuit reasoned that Congress's grant of rights under the FECA to all federal employees "should not prevent enforcement of a provision quite specifically intended to remedy unlawful discrimination." Id. at 290.

Furthermore, this court finds persuasive the fact that the Rehabilitation Act itself does not mention the exclusivity

provisions contained in FECA.[8] In Miller, the Third Circuit similarly found persuasive the fact that Title VII did not specifically refer to FECA's exclusivity provisions. Miller, 802 F.2d at 662 (stating that nothing in the legislative history of either Title VII or the FECA suggests that the exclusivity clause of the FECA applies to "suits for relief for discrimination"). This court agrees with the Miller court's rationale and concludes that Congress did not intend recovery under the FECA to bar subsequent discrimination claims brought pursuant to the Rehabilitation Act.

Based on the lack of Congressional intent for FECA claims to bar subsequent discrimination claims and the persuasive federal precedent on this issue, this court rules that Meester's present claim, brought under the Rehabilitation Act, is not barred by her previous recovery under the FECA. However, the court will not allow any double recovery in the event some of the relief available under the FECA and the Rehabilitation Act were to overlap. The court notes that both FECA and the Rehabilitation Act guard against double

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In contrast, when Congress enacted the Swine Flu Act, which authorized claims against the federal government "for injuries resulting from the vaccination program," Congress specifically stated that recovery under the Swine Flue Act was precluded if a claimant had already been compensated pursuant to another "method of compensation . . . " Miller v. Bolger, 802 F.2d 660, 664 n.2 (3d Cir. 1986) (citing the National Swine Flue Immunization Program of 1976, § 2(k)(5)(C), 90 Stat. 1113, 1116-17 (1976) (repealed 1978)).

recovery. See 5 U.S.C.A. §§ 8131-32 (1988); 29 U.S.C.A. § 794a(a)(1) (1988); 42 U.S.C.A. § 2000e-5(g) (1988).

IT IS SO ORDERED:

Defendant's motion for summary judgment (doc #24) is denied.

Dated: September 18, 1995

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Marjorie A. Meester,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. A3-93-80
	)	
Marvin T. Runyon,	)	
Postmaster General,	)	
United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Trial of this case is scheduled to begin on May 20. Plaintiff has moved to amend the complaint to clarify the nature of her claims. The court grants the motion to amend, but the amendment has raised certain issues the court must resolve prior to trial.

REASONABLE ACCOMMODATION ISSUE

The parties have recently focused on the issue of the "position in question." In order to pursue her claim under the Rehabilitation Act, plaintiff must be an "otherwise qualified individual with a disability." 29 U.S.C. § 794. Defendant claims the relevant position for determining whether plaintiff is

a qualified individual is her original job, that of a postal distribution clerk. Plaintiff contends the position consists of the limited duties she now performs.

The court's reflection on this issue and the recent refinement of the nature of the plaintiff's claims necessarily leads the court to revisit an argument previously raised by defendant, which the court only briefly addressed and rebuffed: whether plaintiff's administrative claim under the Federal Employees' Compensation Act (FECA) bars subsequent Rehabilitation Act claims.

Defendant initially filed a motion for summary judgment directed only at whether the U.S. Postal Service (USPS) exercised good faith in attempting to accommodate plaintiff's disability and whether a FECA claim precluded any subsequent claim brought pursuant to the Rehabilitation Act. The court ruled that it could not determine the "good faith" issue as a matter of law on the record then presented and that FECA did not act as an absolute bar to Rehabilitation Act claims.[1] The court did not separately address the impact of a FECA remedy on just plaintiff's accommodation claims.

The defendant then conducted further discovery and moved for reconsideration on the issue of "good faith" but did not reargue FECA preclusion. During this stage of this case, defendant raised as a peripheral issue whether plaintiff was a "qualified individual with a disability," arguing that she is unable to perform the essential functions of a postal distribution

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[1] The court later noted upon reconsideration of the "good faith" attempt to accommodate issue that plaintiff was also raising disparate treatment and retaliation claims.

clerk and therefore has no Rehabilitation Act claim. Since this argument was not made in the original summary judgment motion and was not argued as a principal issue in the reconsideration motion, the court did not address the issue at that time.

Now the court concludes that defendant's position on FECA and on "qualified individual" is correct as applied to plaintiff's accommodation claims. Plaintiff suffers from a work-related injury. It is clear and undisputed that she can no longer perform the essential functions of a postal distribution clerk position, even with reasonable accommodation. Because her injury was work-related, she pursued a claim and enjoyed certain rights under FECA. If she was not to be placed on total disability retirement status, the USPS as her employer was required to modify her duties to meet the limitations of her injury. As a result, in proceedings before the Department of Labor's Office of Workers' Compensation Programs under FECA, plaintiff's present set of duties, consisting of telephone customer service and checking in carriers, was created to meet her work-related injury medical restrictions. She has been performing those duties since 1991, and it appears she may be permanently limited to those duties.

Plaintiff's present limited duties do not constitute a regular USPS position. Her "position" exists solely as a FECA accommodation. If her condition were to improve to the point that she could return to her original job, her present "job" would be eliminated. Likewise, if she were to leave the USPS, the "job" would be eliminated. In essence, plaintiff is presently receiving workers' compensation benefits under FECA in the form of a special job. Any further accommodations she claims to need as a result of her work-related injury was or is a claim

available to her under FECA. She is presently performing a job approved for her by the Department of Labor. Determinations by the Department of Labor regarding job duty limitations and work conditions under FECA are not subject to judicial review. 5 U.S.C. § 8128(b)(1) and (2).

Plaintiff cannot take her present FECA-created duties and bootstrap them into the "position in question" for determining whether she is qualified to perform the essential functions of the position for purposes of a Rehabilitation Act failure to reasonably accommodate claim. Her remedy for accommodating her disability continues to be under FECA. It may not be the remedy she prefers, but it is the sole remedy available to federal employees seeking accommodation for their work-related injuries. See Stubler v. Runyon, 892 F.2d 228 (W.D. Mo. 1994). If plaintiff did have a Rehabilitation Act claim of lack of reasonable accommodation her "qualified" status would have to be based on her original position of distribution clerk. She cannot perform the essential functions of that job, even with reasonable accommodations, so her claim would necessarily fail.

The court concludes that its earlier rulings on defendant's motion for summary judgment must be vacated and plaintiff's accommodation claims, even as now alleged in Court II of the amended complaint, must be dismissed.

DISPARATE TREATMENT ISSUE

Notwithstanding the court's ruling on what should be considered the "job in question" as the starting point to determine whether defendant has "reasonably accommodated" plaintiff, the court finds that, for purposes of plaintiff's

disparate treatment claim, the "job in question" would not be plaintiff's original "distribution clerk" position.

The court is persuaded by the reasoning in Dancy v. Kline, 638 F. Supp. 1076 (N.D. Ill. 1986), which the USPS has cited in its brief. In Dancy, the federal district court considered issues not unlike the issues present in this case and ruled that "the position in question" refers to the position which is the subject of the lawsuit. Id. at 1078. The court illustrated that:

> If the case involves a denial of promotion, the 'position in question' would be the position to which the plaintiff seeks to be promoted. If the case involves a refusal to hire, the 'position in question' would be the position to which the plaintiff has applied.

Id. Plaintiff must still establish that she can perform the "essential functions" of the "job in question" before attempting to prove her disparate treatment claim. However, in the present case, the job that is the subject of plaintiff's disparate treatment claim is the "full-time regular" position (with split days off), which defendant offered plaintiff.

RETALIATION CLAIM

Because plaintiff's retaliation claims are not dependent on a determination of what should be considered the "job in question," the court makes no ruling as to what should be considered the "job in question" for purposes of plaintiff's retaliation claims. See Berg v. La Crosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980) (stating that for purposes of a retaliation claim, a plaintiff need not actually establish that the original

complaint of discrimination, which triggered the alleged retaliation, was meritorious); Jennings v. Tinley Park Comm. Consol. Sch. Dist. No. 146, 864 F.2d 1368 (7th Cir. 1988).

IT IS ORDERED:

1. Plaintiff's motion to amend her complaint is granted.
2. Plaintiff's "reasonable accommodation" claims, as stated in Count II of the amended complaint, are dismissed with prejudice.

Dated: May 17, 1996

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Marjorie A. Meester,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. A3-93-80
	)	
Marvin T. Runyon,	)	
Postmaster General,	)	
United States Postal Service	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This order amends the court's previous orders dated December 20, 1993 (doc. # 70) and May 17, 1996 (doc. #99). Based on the stipulation of the parties and the court's own determination, the court finds that the issues resolved in the two orders are controlling questions of law to which there are substantial grounds for a difference of opinion. The court further finds that an immediate appeal from the two orders may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Although the court grants the relief sought in the parties' stipulation, the court does not necessarily endorse the parties' characterizations in the stipulation regarding the nature and implications of certain of the court's findings.

The court has made the further determination that a stay of the proceedings before this court is appropriate pending the Eighth Circuit Court of Appeals' decision on the application for appeal.

IT IS SO ORDERED.

Dated: May 17, 1996

/s/ Karen K. Klein
Karen K. Klein
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-8075NDF

Marjorie Meester, *
*
Petitioner, *
*
vs. *
*
Marvin T. Runyon, *
Postmaster General, *
United States Postal Service, *
*
Respondent. *

Petitions for
Permission to Appeal

No. 96-8076NDF

Marjorie Meester, *
*
Respondent, *
*
vs. *
*
Marvin T. Runyon, *
Postmaster General, *
United States Postal Service *
*
Petitioner *

JUDGMENT

Cross-petitions for permission to bring an interlocutory appeal have been considered by the court and are denied.

June 10, 1996

A true copy

ATTEST:

/s/ Michael E. Gans
Clerk, U. S. Court of Appeals
Eighth Circuit

5 U.S.C. § 8101(5)

"'Injury' includes, in addition to injury by accident, a disease proximately caused by the employment, and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices which shall be replaced or repaired, and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired, or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services;"

29 U.S.C. § 791(b)

"**Federal agencies; affirmative action program plans.** Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, with one hundred and eighty days after the date of enactment of this Act [enacted September 26, 1973], submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities."

29 U.S.C. § 794a(a)(1)

"The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of section 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 501 of this Act [29 U.S.C. § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy."

42 U.S.C. § 1981a(a)(2)

"Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. § 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791) and the regulations implementing section 501 [29 U.S.C. § 791], or who violated the requirements of section 501 of the Act [29 U.S.C. § 791] or the regulations implementing section 501 [29 U.S.C. § 791] concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C. § 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent."

42 U.S.C. § 1981a(a)(3)

"Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. § 12112(b)(5)] or regulations implementing section 501 of the Rehabilitation Act of 1973 [29 U.S.C. § 791], damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business."

42 U.S.C. § 1981a(b)(1)

"Determination of punitive damages. A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

42 U.S.C. § 2000e-16(a)

"**Discrimination prohibited.** All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, United States Code, in executive agencies as defined in section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Fed. R. Civ. P. 15(a)

"**Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders."

Fed. R. Civ. P. 56(c)

"**Motion and Proceedings Thereon.** The Motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

29 C.F.R. § 1614.203(b)

"The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified individual with physical or mental handicaps."

29 C.F.R. § 1614.203(c)(1)

"An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program."

FILED
APR 26 1999

No. 98-1048

In the Supreme Court of the United States

OCTOBER TERM, 1998

MARJORIE A. MEESTER, PETITIONER

v.

WILLIAM HENDERSON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal employee who, after suffering a job-related injury, was required by the Department of Labor, pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, to accept a special limited-duty job created by her employing agency or lose compensation benefits may bring suit under the Rehabilitation Act of 1973 to compel her employing agency to make further changes in that job as reasonable accommodations of the disability caused by her injury.

2. Whether the court of appeals erred in affirming without discussion the district court's refusal to allow petitioner to amend her complaint out of time to add a new demand for punitive damages in her related disparate treatment claim.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1048

MARJORIE A. MEESTER, PETITIONER

v.

WILLIAM HENDERSON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-19) is reported at 149 F.3d 855. The various orders of the district court (Pet. App. 20-43; App., *infra*, 1a-13a) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1998. A petition for rehearing was denied on September 29, 1998. The petition for a writ of certiorari

[1] The appendix to the petition does not contain all of the relevant orders of the district court, most notably the September 13, 1996, order that ruled on the second issue that petitioner raises in this Court. We have therefore reproduced that order in an appendix to this brief.

was filed on December 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Employees of federal agencies, including the United States Postal Service, who are injured while performing their job duties have a right to workers' compensation benefits for those injuries under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* (FECA). Under FECA, employees receive ongoing compensation and medical benefits when they suffer a loss of wage earning capacity due to a work-related injury. See 5 U.S.C. 8102(a). The liability under FECA of the United States or the employing agency "is exclusive and instead of all other liability * * * because of the injury or death." 5 U.S.C. 8116(c). The Secretary of Labor is authorized to administer the payment of benefits, adjudicate claims, and decide all questions arising under the statute. 5 U.S.C. 8124(a), 8145, 8149. The Secretary's decision "in allowing or denying a payment under [FECA] is * * * final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. 8128(b). The Secretary has delegated her responsibilities under FECA to the Director of the Office of Workers' Compensation Programs (OWCP). 20 C.F.R. 10.2.[2]

Compensation benefits are generally made through regular periodic payments for as long as the disability exists. However, a partially disabled employee who

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[2] The regulations codified in the 1998 version of the Code of Federal Regulations were in effect during the period relevant to this case but have been superseded by new regulations issued on November 25, 1998. See 63 Fed. Reg. 65,284.

"refuses or neglects to work after suitable work is offered to * * * him * * * is not entitled to compensation." 5 U.S.C. 8106(c)(2). See also 5 U.S.C. 8106(a); 20 C.F.R. 10.124(b).

Department of Labor regulations instruct the employing agency to "monitor the employee's medical progress and duty status by obtaining periodic medical reports." 20 C.F.R. 10.123(b). The agency may offer other jobs to a partially-disabled employee if it determines that the employee "is able to: (1) [p]erform in a specific alternative position which is available within the agency," or "(2) [p]erform restricted or limited duties" if "necessary accommodation can be made." 20 C.F.R. 10.123(c). Even if the employee has been terminated because he was unable to return to his regular position and the agency was unable to accommodate his limitations at that time, the agency may later "offer reemployment in a position suitable to the former employee's capabilities." 20 C.F.R. 10.123(d).

The Department of Labor's OWCP evaluates an offer of employment from the employing agency to determine if it is suitable, *i.e.*, is within the employee's educational and vocational capabilities, within any limitations and restrictions which pre-existed the injury, and within the limitations and restrictions which resulted from the injury. 20 C.F.R. 10.124(c). If OWCP determines that the work is suitable, the employee is notified and provided the opportunity to show that it is reasonable or justified for him to refuse the offer. 20 C.F.R. 10.124(e). If an OWCP claims examiner determines that the employee is not reasonable or justified in refusing the work, the employee's compensation benefits (but not medical benefits) are terminated. *Ibid.*

b. Under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, federal agencies may not discrimi-

nate against a "qualified individual with * * * [a] handicap[]." 29 C.F.R. 1614.203(b). An individual is qualified if he or she "with or without reasonable accommodation, can perform the essential functions of the position in question." 29 C.F.R. 1614.203(a)(6). Reasonable accommodations may include a variety of measures to enable an employee to perform the essential functions of the job, such as part-time or modified work schedules. 29 C.F.R. 1614.203(c)(2). Failure to provide reasonable accommodation may constitute unlawful discrimination under Section 501, but an agency is not required to make an accommodation that would impose undue hardship on the operations of its program. 29 C.F.R. 1614.203(c)(1).

The "remedies, procedures, and rights set forth" in Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, also apply to claims under Section 501. 29 U.S.C. 794a(a)(1). Under those procedures, a complainant is entitled to de novo review in federal district court of his or her discrimination claim, even if the claim has previously been denied by the employing agency or the Equal Employment Opportunity Commission (EEOC). See generally *Chandler* v. *Roudebush*, 425 U.S. 840 (1976).

2. Petitioner worked as a clerk for the Postal Service in the Fargo, North Dakota, area for several years until she developed chronic tendonitis and carpal tunnel syndrome. See Pet. App. 3, 24. She filed a FECA claim, and the Department of Labor determined that she had a 25% impairment of her upper extremities, which prevented her from performing her duties as a postal clerk. *Id.* at 3-4, 24, 38. The Postal Service offered petitioner several alternative limited-duty positions, but in consultation with her physician, she declined those offers as beyond her physical limitations.

Id. at 4, 38. The Postal Service then created a special limited-duty position for petitioner, under which her only duties are to provide customer service by telephone and to check in carriers. *Id.* at 38. That position did not previously exist, is not a regular Postal Service job, and will be eliminated if and when she leaves the employ of the Postal Service. *Ibid.* Petitioner's doctor "approve[d]" the position, although he stated that petitioner "would do much better to work 5 days only and have 2 consecutive days off." C.A. App. 184. The Postal Service determined it could not provide two consecutive days off because Mondays and Saturdays are its busiest days, and Sunday is always a day off. Pet. App. 4.

OWCP determined that the position was "fully consistent with [petitioner's] physical limitations" after reviewing the position, petitioner's medical records, and her doctor's recommendations. Pet. App. 4, 38; see also Gov't C.A. Br. App. Exh. 9. Petitioner did not refuse the job and avail herself of her administrative appeal rights under 5 U.S.C. 8124, which allows a claimant dissatisfied with an initial determination to obtain a hearing. See Pet. App. 7. Instead, petitioner accepted the job under protest, asserting that she needed two consecutive days off, as well as additional rest breaks. *Id.* at 4.

3. Petitioner then brought a civil action against the Postal Service in district court under the Rehabilitation Act, asserting that the Postal Service's failure to provide two consecutive days off, as well as better rest breaks, discriminated against her by reason of her disability. Pet. App. 4. Petitioner contended that those additional changes in her current duties would constitute a "reasonable accommodation" which, if granted, would enable her to "perform the essential functions of

the position in question." See 29 C.F.R. 1614.203(a)(6). In two other counts, petitioner argued that the Postal Service had accorded her disparate treatment by attaching conditions to her position that did not apply to other employees and that the Postal Service had retaliated against her for filing her discrimination claim. See Pet. App. 4.

The district court initially denied the Postal Service's motion to dismiss or for summary judgment on the reasonable accommodation claim. Pet. App. 24-35. Later, however, the district court vacated its earlier rulings and dismissed the reasonable accommodation claim. *Id.* at 36-39. The court concluded that "the position in question" for purposes of the reasonable accommodation analysis is petitioner's original postal clerk position, which she cannot now perform even with a reasonable accommodation, rather than her current limited-duty position. *Ibid.* "In essence," the district court concluded, "[petitioner] is presently receiving workers' compensation benefits under FECA in the form of a special job. Any further accommodations she claims to need as a result of her work-related injury was or is a claim available to her under FECA," which, the court concluded, she could not "bootstrap" into a Rehabilitation Act claim. *Id.* at 38-39.

The district court allowed the disparate treatment and retaliation claims to go to trial. Pet. App. 5. Shortly before the trial, petitioner moved to amend her complaint to add a claim for punitive damages under 42 U.S.C. 1981a(b)(1), but the district court denied the motion on the ground that petitioner had made the motion more than a year after the deadline that the district court had set for filing any motion to amend the complaint to add claims or defenses. App., *infra*, 3a. The trial proceeded, but the district court granted

judgment as a matter of law to the Postal Service on the retaliation claim at the close of petitioner's case. Pet. App. 5. The court submitted the disparate treatment claim to the jury, which returned a verdict for the Postal Service, and the district court then denied petitioner's motions for judgment as a matter of law and for a new trial. *Id.* at 5, 20-22, 23.

4. The court of appeals affirmed, with Judge Heaney dissenting. Pet. App. 2-19. The majority noted that the district court did not hold that FECA barred all claims under the Rehabilitation Act; indeed, the district court had proceeded with the disparate treatment and retaliation claims. *Id.* at 6. Rather, the court of appeals explained, the district court had barred only the reasonable accommodation claim. *Ibid.* The court concluded that the district court's determination that petitioner was not entitled to a jury determination on her failure-to-accommodate claim was correct. *Ibid.*

The court reasoned that petitioner "seeks accommodations in performing the alternative position she was awarded under FECA," which the Department of Labor held was within her physical capabilities, and thus she "is essentially asking us to hold that the Department of Labor was wrong in directing her to accept this position. Such a holding would contravene FECA's prohibition against judicial review of compensation decisions." Pet. App. 6 (citing 5 U.S.C. 8128). The court also stated that it had carefully reviewed petitioner's arguments regarding the disparate treatment and retaliation claims and found them to be without merit. *Id.* at. 7-8.

In dissent, Judge Heaney concluded that the court was in error in barring petitioner's reasonable accommodation claim, because "FECA and the Rehabilitation Act provide significantly different remedies," and

because FECA bars only tort remedies, not claims of discrimination under the Rehabilitation Act. Pet. App. 11, 13-14. The majority declined to respond to the dissent's arguments, concluding that "[t]he dissent either misconstrues or misunderstands the limited breadth and depth of * * * today's holding." *Id.* at 6 n.3.

ARGUMENT

The decision of the court of appeals does not conflict with the decision of any other court of appeals and does not warrant this Court's review. Although the court of appeals erroneously held that FECA bars petitioner's failure-to-accommodate claim under the Rehabilitation Act, its conclusion that petitioner is not entitled to a jury determination of that claim is correct on the facts of the case. Petitioner's second claim is insubstantial. Further review of petitioner's claims is therefore not warranted.

1. A determination by the Labor Department under FECA that a job is "suitable" for an injured employee as a substitute for compensation benefits does not as a matter of law preclude a claim under the Rehabilitation Act that the Postal Service failed to make reasonable accommodations to the employee's disability. Nonetheless, on the facts of the case, the court of appeals was correct that the Postal Service is entitled to summary judgment.

a. FECA, like most workers' compensation statutes, provides that its remedies are exclusive. FECA's exclusivity clause, 5 U.S.C. 8116(c), implements a trade-off typical of workers' compensation schemes, under which federal employees are guaranteed receipt of immediate fixed benefits regardless of fault and without need for litigation but give up the right to sue for damages in tort under statutes such as the Federal

Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2672-2680. See generally *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193-194 (1983). FECA's exclusivity provision, however, does not extend to bar actions under the Rehabilitation Act, even if those actions arise from the same factual basis as an employee's FECA claim.

In addition, FECA's preclusion-of-review provision, 5 U.S.C. 8128(b), establishes that the Department of Labor is the final decision-maker on FECA benefit claims. That provision bars suits challenging actions of the Department of Labor, not actions taken by other agencies in connection with FECA claims.

Moreover, administrative findings that have not been subject to judicial review generally are not preclusive in Rehabilitation Act suits. See *Chandler* v. *Roudebush*, 425 U.S. 840, 863-864 (1976) (federal agency determinations not preclusive in Title VII actions); *University of Tenn.* v. *Elliott*, 478 U.S. 788, 794-796 (1986) (same with respect to state administrative determinations); 29 U.S.C. 794a(a)(1) (remedial rights and procedures under Title VII apply under Rehabilitation Act). And a fair reading of FECA's provisions does not command any exception to that principle.

Petitioner's Rehabilitation Act claim does not seek to impose additional liability on the Postal Service "because of the injury" (5 U.S.C. 8116(c)) she suffered on the job. Rather, the claim seeks to hold the Postal Service liable for failing to make reasonable accommodations in the limited-duty job that it created for her subsequent to that injury. In addition, petitioner is not challenging any "action of the Secretary [of Labor] in allowing or denying a payment" under FECA. 5 U.S.C. 8128(b). Thus, FECA does not, by its terms, bar her failure-to-accommodate claim.

b. On the facts of this case, however, petitioner's failure-to-accommodate claim raises precisely the same issue that OWCP decided against petitioner when it determined that the limited-duty job created for her by the Postal Service was "suitable work" under 5 U.S.C. 8106(c)(1): whether petitioner needed additional rest breaks or two consecutive days off in order to perform the job because of the limitations caused by her work-related injury.

There is often substantial overlap between a determination under FECA that a job proposed by an employing agency is "suitable" and the question under the Rehabilitation Act whether further accommodations are required to accommodate the employee's disability. Compare 20 C.F.R. 10.124(c) with 29 C.F.R. Pt. 1630 App. § 1630.2(o) (Interpretive Guidance on Title I of the Americans with Disabilities Act). Central to both inquiries is whether the employee can, consistent with his or her limitations, perform the functions of the job without further accommodations.

Although in many circumstances the inquiries are not identical, no such circumstances are present in this case. First, a failure-to-accommodate claim may differ from a suitability determination under FECA if there has been a change in the employee's condition after the suitability decision that necessitates further accommodation. But petitioner has not alleged that such a change occurred here. Although petitioner claimed that she suffered some adverse health consequences as a result of the failure to accommodate her, see Pet. App. 15-16, she has not claimed that a deterioration in her condition has made accommodations necessary that were not necessary at the time the Labor Department determined that her limited-duty job was suitable. Indeed, she demanded precisely the same accommoda-

tions that she now demands under the Rehabilitation Act at the time of the Department's suitability determination.

Second, an accommodation may be required under the Rehabilitation Act to enable the handicapped employee "to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities." 29 C.F.R. Pt. 1630 App. § 1630.2(o). But the Labor Department's determination whether the job is "suitable" depends solely on whether performance of the job is "within the employee's educational and vocational capabilities, within any limitations and restrictions which pre-existed the injury, and within the limitations and restrictions which resulted from the injury." 20 C.F.R. 10.124(c). Therefore, a job may be suitable, but further accommodations may nonetheless be required to enable the employee to perform the job with a proficiency that allows the employee equal opportunity for advancement or other rewards.

Petitioner has not alleged here, however, that the accommodations she desires are needed to enable her to perform at a level that will allow advancement or other rewards. Indeed, she could not make such an allegation, because (with minor exceptions not applicable in this case) advancement in the Postal Service for unionized employees like petitioner is based on seniority rather than performance, and there is no merit pay or other compensation provided as an award for superior performance. See *Agreement Between United States Postal Service and American Postal Workers Union, AFL-CIO National Association of Letter Carriers, AFL-CIO* (1990-1994).

Nor has petitioner alleged any other respect in which her accommodation claim differs from the issue decided

by the Labor Department when it found the job "suitable" under FECA.

c. Under those circumstances, although OWCP's suitability determination does not preclude petitioner's failure-to-accommodate claim, the suitability determination, as well as the evidence of the medical reports and process under which that determination was reached, is highly probative evidence that no accommodation is required. Cf., *e.g.*, *Chandler* v. *Roudebush*, 425 U.S. at 863 n.39; *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 114 (1991). The fundamental purpose of the reasonable accommodation requirement is to enable a person to perform the essential function of the position in question. See *School Board of Nassau County* v. *Arline*, 480 U.S. 273, 287 n.17 (1987). The Rehabilitation Act does not entitle an employee to her preferred accommodation but only to a reasonable one. *E.g.*, *Keever* v. *City of Middleton*, 145 F.3d 809, 812 (6th Cir.), cert. denied, 119 S. Ct. 407 (1998); *Stewart* v. *Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997), *Gile* v. *United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996); *Carter* v. *Bennett*, 840 F.2d 63, 67 (D.C. Cir. 1988). Cf. *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 68-69 (1986) (religious accommodations under Title VII).

On the record in this case, no reasonable trier of fact could find that petitioner needs further accommodations to perform the essential functions of her limited duty position. The Department of Labor determined that the position is suitable, without requiring any further accommodation. Petitioner's doctor "approv[ed]" the position as structured. C.A. App. 184. And petitioner has been performing the job successfully since 1991. C.A. App. 59 (First Am. Compl. ¶ 14). Those facts establish that, as a matter of law, the Postal

Service did not violate the Rehabilitation Act by failing to make further accommodations to petitioner's disability. The court of appeals therefore reached the correct result, and certiorari is not warranted.[3]

2. The narrow issue presented by the decision of the court of appeals does not warrant this Court's review in any event. The court's decision does not conflict with the decision of any other court of appeals, and a conflict will not arise in the future because the government, in cases like this one, will argue that FECA determinations have evidentiary weight rather than preclusive effect with respect to claims under the Rehabilitation Act or similar civil rights statutes.

The court of appeals did not hold that FECA bars all Rehabilitation Act claims; to the contrary, it noted with approval the district court's decision to allow petitioner's disparate treatment and retaliation claims to go to trial. Pet. App. 6. The court did not even hold that all reasonable accommodation claims are barred but rather that petitioner's "unique" failure-to-accommo-

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[3] The district court initially denied summary judgment on the ground that, although petitioner's doctor "approve[d]" the position as structured (C.A. App. 184), the doctor's statement that petitioner would "do much better" with two consecutive days off was ambiguous and raised a question of fact. Pet. App. 29-30. The court, however, later vacated that determination and dismissed the claim based on preclusion. See *id.* at 36-39. As we have explained in the text, the court should not have found the suitability determination preclusive; but it should nonetheless have granted summary judgment based on the absence of any genuine issue of material fact, particularly in light of the suitability determination and petitioner's own doctor's approval of the job. Those facts also establish that petitioner could not recover compensatory damages because the Postal Service had made "good faith" efforts to identify and to make reasonable accomodations. 42 U.S.C. 1981a(a)(3).

date claim was barred. *Ibid.* The decision appears to be the first reported court of appeals decision addressing that issue.

Petitioner alleges a conflict among the courts of appeals, but the cases she cites do not address the specific issue presented here—whether FECA bars a claim under the Rehabilitation Act for failure to make reasonable accommodations to a limited-duty job that the employing agency offered the claimant to avoid paying compensation benefits under FECA. The cases that petitioner cites (Pet. 7-8) involve the broader question whether FECA generally preempts discrimination remedies, such as under Title VII. As we have explained, the court of appeals expressly declined to hold that such general preemption exists.

Thus, in *Miller* v. *Bolger*, 802 F.2d 660 (3d Cir. 1986), one of the two court of appeals decisions that petitioner cites, the plaintiff alleged that he suffered retaliation for his testimony on behalf of a black fellow-employee, some of it in the form of physical attacks, and that the retaliation left him permanently disabled. 802 F.2d at 661. Although the plaintiff received FECA benefits for his physical injuries, the court of appeals determined that those benefits did not fully compensate him for the underlying retaliation, and he could therefore bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to obtain complete relief. 802 F.2d at 663-664. The plaintiff's claim in *Miller* was not, as is petitioner's claim here, based on the employing agency's failure to provide additional accommodations to a limited-duty position that the agency offered the claimant to avoid paying compensation benefits under FECA.

Similarly, in *Nichols* v. *Frank*, 42 F.3d 503, 515 (9th Cir. 1994), the plaintiff alleged sexual harassment that

caused several injuries. Among those injuries was post-traumatic stress, which entitled her to FECA benefits. The Ninth Circuit concluded that FECA did not bar the plaintiff's recovery under Title VII for her other injuries. In *Nichols*, as in *Miller*, the plaintiff's claim was not based on the employing agency's failure to provide additional accommodations to a limited-duty position that the agency offered the claimant to avoid paying compensation benefits under FECA.

In this case, petitioner also raised other claims under the Rehabilitation Act. The district court allowed those disparate treatment and retaliation claims to go to trial, and it allowed the disparate treatment claim (which somewhat overlaps the reasonable accommodation claim, see Pet. App. 20-22) to go to the jury. As we mentioned above, the court of appeals approved of the distinction between the different types of claims and cited that distinction in support of its holding affirming the dismissal of the reasonable accommodation claim. *Id.* at. 6. The decision of the court of appeals is thus fully consistent with the cases of the other courts of appeals.

3. Petitioner briefly raises a second issue, concerning whether the U.S. Postal Service is subject to punitive damages under the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(1), which allows an award of punitive damages against a party "other than a government, government agency or political subdivision." That issue, however, is not actually presented by this case.

The district court did not deny petitioner's punitive damages claim on the merits but rather refused to allow petitioner to add the claim by way of a motion to amend her complaint filed more than a year after the district court's deadline for amending the complaint to add new claims or defenses. App., *infra*, 3a. The court of ap-

peals affirmed that holding without specific discussion. Pet. App. 7-8. Petitioner suggests no reason why that holding was an abuse of discretion or otherwise in error.

Moreover, petitioner appears to concede that there is no conflict among the courts of appeals on the question whether the Postal Service is subject to punitive damages. See Pet. 9-10. The only court of appeals decision addressing that question that petitioner cites held that the Postal Service is not subject to punitive damages under Section 1981a(b)(1) because it is a "government agency" and thus comes within that Section's express exception to the authorization of punitive damages. *Baker* v. *Runyon*, 114 F.3d 668 (7th Cir. 1997). The Sixth Circuit reached the same result in *Robinson* v. *Runyon*, 149 F.3d 507 (1998). This Court denied certiorari in *Baker*. 119 S. Ct. 335 (1998). The Court should also deny certiorari here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Civil No. A3-93-80

MARJORIE A. MEESTER, PLAINTIFF

v.

MARVIN T. RUNYON, POSTMASTER GENERAL
UNITED STATES POSTAL SERVICE, DEFENDANT

[Filed: September 13, 1996
Received: September 17, 1996]

ORDER MEMORANDUM REGARDING TRIAL

The trial in this case is scheduled to begin on September 30, 1996. Plaintiff has moved to amend the complaint to add an alternative statutory basis for her disparate treatment claim (Lodged, but not filed), and to add further allegations of disparate treatment (Lodged, but not filed), and has separately moved to add a claim for exemplary damages (doc. #115). At this time, the court will rule on the pending motions and also take this opportunity to rule on several other issues that arose at the most recent "issues" conference.

I. Amending Complaint to Allow a Claim Under 29 U.S.C. § 791

This case took another dramatic turn following the United States Supreme Court's decision in *Lane v.*

Pena, 116 S. Ct. 2092 (1996), in which the Supreme Court stated that compensatory damages are not available in actions brought under 29 U.S.C. § 794(a) (hereinafter § 794(a)). The court respects, but does not agree with, the plaintiff's position that her complaint, as it now stands sufficiently asserts a disparate treatment claim under 29 U.S.C. § 791 (hereinafter § 791). Specifically, the only statutory basis that the plaintiff cites in her complaint, which would establish a disparate treatment action under the Rehabilitation Act, is § 794 (a).

In her most recent submission, the plaintiff correctly notes two instances in which the court cited § 791 in its September 18, 1995 order. The plaintiff explains that she relied on these citations to form a belief that the court already considered her claims to be under both § 794 (a) and § 791. The plaintiff further explains that this reliance caused her to believe that she did not need to further amend her complaint.

The defendant opposes the addition of a § 791 action because the defendant states that it has only prepared for a disparate treatment claim under § 794(a), which defendant claims carries a different burden of proof. The court agrees with defendant that § 794(a) and § 791 would have different standards and orders of proof. The court also agrees that amending the complaint, at this point, would cause defendant notable degree of prejudice. Nonetheless, the court rules that plaintiff's motion for amending the complaint to add a § 791 claim must be granted. Although the court suspects that no one actually relied on the introductory, inadvertent citations in the court's September 18 order (as neither party commented on the court's citation in the motion to reconsider that order), the court cannot rule that plaintiff's claimed reliance on the court's earlier order

was unreasonable. Therefore, the court rules that plaintiff will be allowed to amend her complaint to assert § 791 as the basis for her disparate treatment claim.

II. Amending Complaint to Allow Exemplary Damages

Plaintiff filed a motion on August 23, 1996 to amend her complaint to seek exemplary damages. (doc #115). In this case, the parties submitted, and the court approved, a scheduling plan which allowed the parties until March 1, 1995 to move to amend pleadings to add claims or defenses. (doc. #9, at 2). Neither party has requested an extension of this deadline. Granted, this case has experienced many postponements. However, the court finds that those difficulties do not excuse a motion filed over sixteen months late. Furthermore, the court does not consider *Baker v. Runyon*, No. 95 C 4257 (N.D. Ill. April 18, 1996), as providing plaintiffs with novel legal precedent that would allow them to file this motion at this late date. Therefore, the court denies plaintiff's motion to amend her complaint to seek exemplary damages against the defendant.

III. Amending Complaint to Allow Additional Allegations of Disparate Treatment

Plaintiff, in her most recent *proposed* Amended Complaint, seeks to pursue additional allegations of disparate treatment. The court notes that these allegations have generally been a part of the record since this action was filed. (doc. #1). However, in the plaintiff's *filed* Amended Complaint (Filed May 17, 1996, which was accepted by the court), she characterizes these allegations as claims of retaliation. (doc. #101, at 4-5). The court concludes that it will not allow this further

amendment to the complaint, at this late date, as it would unduly prejudice the defendant. The court allowed the plaintiff the luxury of amending her complaint on May 17, 1996. If plaintiff wanted to establish these allegations as both retaliatory treatment claims and disparate treatment claims, she could and should have done so at that time. Accordingly, the court will not allow the plaintiff to pursue the additional disparate treatment claims contained in her most recent *proposed* Amended Complaint.

IV. The Protected Activity that Gave Rise to Plaintiff's Retaliation Claims

The court notes that an issue exists as to which "protected activity" plaintiff's retaliation claims seek to redress. Defendant argues that plaintiff can only assert retaliatory conduct based on plaintiff filing an EEOC charge. The plaintiff, on the other hand, argues that she should be able to assert retaliatory conduct based on her EEOC charge, *and* her actions in obtaining workers' compensation benefits.

The court rules that the plaintiff can only claim retaliatory treatment in response to her filing an EEOC charge. In her *filed* Amended Complaint, plaintiff alleges, "The Defendant took adverse employment actions against the Plaintiff because she filed a complaint of discrimination with the Equal Employment Opportunity Commission (EEOC)." (doc. #101, Amended Complaint, Count III, at 4,). Similarly, in the approved pretrial statement, under "CONTROVERTED AND UNRESOLVED ISSUES," the parties together listed as an issue for trial: "Whether or not the Defendant engaged in retaliatory conduct against the Plaintiff by reason of Plaintiff engaging in protected activity of making a discrimination claim." (doc. #100, at 11 (letter "g")). The

court notes that in her most recent *proposed* Amended Complaint, the plaintiff asserts retaliation because she "filed a workers compensation claim." (Lodged, but not filed, at 5). The court, however, finds that this proposed amendment has been filed too late. Again, the court afforded the plaintiff the luxury of filing an amended complain only four months ago. At that late stage, plaintiff should have understood how her claim should be characterized, and the defendant should be entitled to rely on that characterization to prepare for trial.

In addition to the untimeliness of plaintiff's request, the court finds that the retaliatory conduct theory was intended only to protect individuals who seek or participate in actions to redress discrimination. The Rehabilitation Act borrows from Title VII to provide individuals protection from retaliatory conduct. *See* 29 U.S.C. § 794a (a) (2). Title VII creates a remedy for only certain types of retaliatory conduct. Specifically, 42 U.S.C. § 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice *by this title*, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this title*.

42 U.S.C. § 2000e-3(a) (emphasis added). The court considers the statute's language clear and unmistakable. The statute would not provide redress for conduct that was done in retaliation for bringing a workers' compensation claim. Plaintiff's only possible redress for such a claim would be with the Department of Labor. Accordingly, the court rules that it will not allow the

plaintiff to allege retaliatory conduct, based on her seeking workers' compensations benefits.

V. The Status of Plaintiff's Individual Retaliation Claims

Until this point, the parties and the court have focused on other issues in this lawsuit and have not thoroughly addressed plaintiff's retaliation claims. In her Amended Complaint, the plaintiff asserts:

The adverse employment actions by the Defendant included the following:

a) Intimidating Plaintiff to perform tasks unrelated to her limited-duty assignment that she should not otherwise perform by reason by her disability;
b) Scheduling Plaintiff to work holidays when other similarly situated employees were not scheduled;
c) Failing to schedule Plaintiff for training sessions when other similarly situated employees were scheduled;
d) Delaying Plaintiff's EEOC process;
e) Ignoring Plaintiff's physician's recommendations;
f) Failing to pay Plaintiff for storm days when other similarly situated employees were paid; and
g) Interfering with Plaintiff's efforts to obtain rest breaks.

(doc. #101, at 4-5).

In its May 17, 1996 order, the court dismissed, with prejudice, plaintiff's claim seeking further accommodations for her alleged disability. (doc. #99, at 4). Briefly, the court reasoned that the plaintiff could no longer

perform the essential functions of her original position and that further accommodation her disability must be sought through FECA. *Id.*

Upon review of the complaint, the court finds that several of the plaintiff's allegations of retaliation are actually requests for further accommodation. Specifically, under allegation "a," plaintiff asserts that the defendant has "[i]ntimidat[ed] Plaintiff to perform tasks unrelated to her limited-duty assignment that she should not otherwise perform by reason by her disability. . . ." (doc. #101, at 4-5). The court finds that simply using the word "intimidate" does not change the nature of defendant's alleged failure to reasonably accommodate the plaintiff's physical condition. Furthermore, the court finds that insisting that an employee perform work that the worker is incapable of doing is not the type of "adverse employment action" that the retaliatory conduct theory is intended to redress. In order to establish a prima facie case of retaliation, a plaintiff must show (1) that she filed a charge; (2) that an adverse employment action was subsequently taken against her; and (3) that a causal connection exist between her engaging in protected activity and the adverse employment action. *See Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 474 (8th Cir. 1992).

"Title VII was designed to address ultimate employment decisions, not address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). To establish an "adverse employment action" in a non-termination case, a plaintiff, at a minimum, must show that the defendant's actions created a "hostile work environment," which

altered the terms or conditions of the plaintiff's employment. In *Saxton v. American Telegraph and Telephone Co.*, the Seventh Circuit Court of Appeals stated: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Saxton v. American Telegraph and Telephone Co.*, 10 F.3d 526, 534 (7th Cir. 1993) (citation omitted). In the present case, the court finds that the defendant's alleged conduct would not constitute an "adverse employment action" and cannot, therefore, be the basis of a retaliatory conduct claim.

Furthermore, the defendant recently asserted that the only time which the plaintiff claims to have been intimidated was the summer of 1992. (doc. #117, Defendant's brief, at 14). If the defendant's assertion is correct, the defendant's alleged conduct would have occurred *before* the plaintiff's EEOC claim, which was filed in December of 1992. Therefore, if this was the only occasion of "intimidation," then it could not be considered retaliation. Accordingly, because the court finds this issue to actually be one of reasonable accommodation and that the defendant's alleged conduct could not be considered an "adverse employment action," under the Rehabilitation Act and Title VII, the court rules that the plaintiff cannot seek redress for the defendant's alleged "intimidation" through a claim of retaliatory conduct.

Next, the court considers allegation "e" to clearly be a charge that the defendant has failed to reasonably accommodate her disability. Plaintiff claims that the defendant "[ignor[ed] Plaintiff's physician's recommendations. . . ." (doc. #101, at 4-5). Furthermore, for

the reasons previously stated, the court does not consider "ignoring" a doctor's recommendations as an "adverse employment action" that could establish a retaliatory treatment claim. Therefore, the court rules that the plaintiff may not assert the defendant's alleged indifference towards the recommendations of plaintiff's doctor as a retaliatory treatment claim.

Finally, the court also considers allegation "g" to be a thinly disguised complaint that the defendant has failed to accommodate the plaintiff's disability. Plaintiff asserts that the defendant has "[i]nterfer[ed] with Plaintiff's efforts to obtain rest breaks." (doc. #101, at 4-5). Furthermore, not only does the court consider this a claim for reasonable accommodations, the court does not consider interfering with rest breaks to be the type of employment practice that the retaliation theory was designed to remedy. Thus, the court will not allow the plaintiff to claim that the defendant obstructed her efforts to take rest breaks, as a retaliation claim.

The next retaliation claim that the court will address is allegation "d" of the Amended Complaint. At allegation "d," the plaintiff asserts that the defendant has "[d]elay[ed] Plaintiff's EEOC process. . . ." (doc. #101, at 4-5). The federal court considers discrimination claims after the EEOC concludes its proceeding. The court does not police the EEOC process. If the plaintiff's EEOC process was delayed by the defendant, the plaintiff could have south redress through the EEOC officer in charge of the case. Assuming, arguendo, that the defendant did delay plaintiff's EEOC process, the defendant's actions would not have any direct effect on the terms and condition of plaintiff's employment. Considering the fact that the plaintiff ultimately did get her EEOC complaint considered, the court cannot construe

the defendant's alleged act of delaying the EEOC process to be an "adverse employment decision." *See Page v. Bolger*, 645 F.2d 277, 233 (4th Cir. 1981) (stating that "it is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of . . . Title VII"). Accordingly, the court will not allow the plaintiff to assert the defendant's alleged delay of the EEOC process as a retaliatory conduct claim.

Although the court has reservations about allegations "b" and "f" of the plaintiff's retaliation claim, the court will not constitute an "adverse employment action," unless the employer's acts establish a "hostile work environment," or otherwise substantially affect an employee's terms or conditions or employment. If the plaintiff cannot fulfill either of the court's requests, the court will dismiss the defendant's alleged denial of training opportunities to the plaintiff as a basis for a retaliatory treatment claim.

VII. The Court's Understanding of Plaintiff's Disparate Treatment Claim and Defendant's Corresponding Defenses

The court, as it did at the "issues" conference, will offer the parties its present understanding of the plaintiff's disparate treatment claim. The court sees this claim as a fairly simple and straight-forward claim. For the purposes of this disparate treatment claim, the only issue is whether the defendant's offer treated Meester differently than non-disabled employees by reason of her disability. Specifically, during the EEOC proceedings, the defendant offered Meester a full-time regular position, with limited duties, but without two consecutive days off. The plaintiff claims that all other

employees, at the Prairiewood Station, who were converted to full-time regular status, received two consecutive days off. Conversion to full-time regular status does not, in itself, create an entitlement to two consecutive days off. Yet, all other full-time regular employees at Prairiewood, plaintiff claims, receive two consecutive days off.

Plaintiff has the initial burden of showing dissimilar treatment. If she shows she was treated differently than nondisabled workers with respect to conversion, the defendant must assert some nondiscriminatory reason for treating her differently. One possible explanation was stated by Richard Bolme at his deposition. When asked why the plaintiff must work on Saturdays, Bolme answered, "Because we can better utilize her on Saturdays because that's the off days for the other window clerks and that's when we're the shortest on help are Saturdays and Monday. . . ." (Bolme Deposition, at 22). Furthermore, Bolme stated, "We can best utilize her duties on Saturday answering the phone, doing the accountable carts. I'm always short on help on Saturdays." (Bolme Deposition, at 24). If substantiated, an explanation that plaintiff's limited duties were needed more on certain days than others could provide a nondiscriminatory reason for different treatment.

The court considers irrelevant any argument by the defendant that since it was not obligated to convert the plaintiff to a full-time regular position in the first place, a job offer to her that was different from the conversion of others is not discriminatory. In a prior memorandum, the defendant stated:

> We assume, therefore, that the Postal Service will be permitted to defend on the basis that it was its good-faith belief that the plaintiff was not qualified

> for conversion, rather than a discriminatory motive, which prevented it from unilaterally converting her.

(Doc. #113, at 4). The defendant further stated:

> If the true reason she was not converted unilaterally was a good-faith belief that she was not legally and factually qualified for conversion, then there can be no Title VII violation for which compensatory damages can be awarded.

Id. at 8. The court considers whether or not the defendant was obligated, due to a union agreement or other commitment, to convert the plaintiff to be irrelevant because the defendant did in fact offer her full-time regular status. The relevant question is not "whether" the plaintiff should have been converted, but rather "how" she was actually offered conversion. That offer moots any issue of entitlement or nonentitlement to full-time conversion.

Again, conversion to full-time regular does not, in itself, create an entitlement to two consecutive days off. Yet, plaintiff claims all other employees at Prairiewood, who were converted to full-time regular status, were given two consecutive days off. If this is accurate, the defendant cannot defend the claim by arguing the plaintiff is not entitled to two consecutive days off, since others are receiving this benefit despite not being entitled to it.

The defendant has also raised the issue of the plaintiff transferring from the Prairiewood station to the downtown main post office. If the defendant could show that the plaintiff could have more easily achieved her desired schedule by transferring downtown, then the court would consider that testimony as supporting

Bolme's contention that requiring the plaintiff to work on Saturdays was due to scheduling concerns and not discrimination based on disability. Also, if seniority was a factor in the defendant's decision—if Meester had less seniority than other full-time regular employees at Prairiewood—the court would also consider that as supporting the defendant's non-discriminatory reason.

The plaintiff will have the ultimate burden of proving discrimination.

VIII. Pre-Trial Submissions

The court will allow the parties until Monday, September 23, 1996 to submit their proposed jury instructions, verdict forms, and trial memoranda.

IT IS SO ORDERED

dated this 13th day of September, 1996

/s/ KAREN K. KLEIN
KAREN K. KLEIN
United States
Magistrate Judge

(3)

Supreme Court, U.S.
FILED
MAY 12 1999
CLERK

Docket No. 98-1048

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

MARJORIE A. MEESTER,

Petitioner,

VS

MARVIN T. RUNYON, POSTMASTER GENERAL,
U.S. POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. CONFLICTING DECISIONS-RULE 10(a)-FECA ISSUE

After nearly five years of litigation and appeals in this matter, Respondent now admits that the Court of Appeals for the Eighth Circuit erred in affirming the United States Court for the District of North Dakota, Southeastern Division's holding that FECA bars Mrs. Meester's failure to accommodate claims under the Rehabilitation Act. (Resp. Brf. 8.) It seems apparent that since Respondent has now admitted that the Court of Appeals for the Eighth Circuit erred in affirming the lower court's holding that receipt of FECA benefits bars Mrs. Meester's failure to accommodate claims under the Rehabilitation Act, then if this holding is vitiated pursuant to Respondent's admission of its error, the Memorandum and Order of the United States Magistrate Judge Karen Klein denying Respondent's original Motion for Summary Judgment on that issue, (Pet. App. 24-35), would stand and a trial by jury would be had. However, it appears that Respondent now claims that, although the Court of Appeals for the Eighth Circuit erred in its affirmance, the end result in this case was appropriate for different factual reasons. (Resp. Brf. 8-15.) In making its argument, Respondent alleges factual inaccuracies central to the issue and fails to acknowledge that a "suitability" determination pursuant to the FECA is substantially different from the "affirmative" obligation required under the Rehabilitation Act.

The Memorandum and Order of United States Magistrate Judge Karen Klein clearly delineates factual disputes. It provided the following:

> "The court, when considering a motion for summary judgment, must view the evidence in the light most favorable to the nonmoving party, who enjoys "the benefit of all reasonable inferences to be drawn

> from the facts." Vacca, 875 F.2d at 1339 (citation omitted). In light of the testimony from Dr. Orson and Jeremy Cahill, this court finds that whether the USPS has made a "good faith" attempt to reasonably accommodate Meester is a material fact over which reasonable minds could differ. Even though the USPS has come very close to satisfying its burden, the court concludes that on the present record the USPS has not fully shown, as a matter of law, that it has engaged in "good faith" efforts to accommodate Meester's disability. Consequently, Meester has a colorable claim for compensatory damages and it therefore is entitled to a jury trial."

Since the standard of review for a grant of summary judgment is de novo, *Salve Regina College v. Russell,* 499 U.S. 225 (1991) and Respondent has admitted that the lower courts erred in their decisions of the legal issue presented, and the question of whether an employer has provided "reasonable" accommodations is a question of fact for a jury, *Frye v. Aspin,* 997 F.2d 426, 428 (8th Cir. 1993), Mrs. Meester is entitled to her jury trial and her writ of certiorari should be granted in order to remand this matter back for trial by jury.

The various genuine disputes of material fact, in which a reasonable trier of fact could find that the Postal Service failed to provide reasonable accommodations to Mrs. Meester, and by failing to do so, further exasperated the injury to Mrs. Meester's upper extremities, include the following:

1. First, in Respondent's Brief in Opposition, Respondent repeatedly states that Ms. Meester's doctor approved the position determined "suitable" by the Department of Labor. (Resp. Brf. 5, 12.) However, Respondent fails to inform the Court of the whole truth surrounding what aspects of the job offer were approved by Dr. Orson. The job offer read as follows:

"UNITED STATES POST OFFICE

DATE: September 9, 1991

REF: SO:LGD:dk

SUBJECT: Revised Job Offer

Marjorie Meester

601 Pheasant Run

West Fargo, ND 58078

This revised job offer is being made by the U. S. Postal Service, Fargo, ND in compliance to your physical limitations and medical restrictions as outlined by your personal physician, Dr. Gregory G. Orson, MD, and recommendations by Barbara K. Peterson, OTR/CHT from her on-site evaluation of the previous job offer of January 31, 1991. This job offer is also being made to comply with Office of Workers' Compensation Programs determination as directed by letter dated August 16, 1991, regarding your wage loss experienced with a 32 hour week verses a 40 hour week you are entitled to. You will also receive ten paid federal holidays per year as a full time regular employee, under limited duty. This revised job offer allows you to perform assigned tasks at your own pace and with assistance as needed, as in previous job offer. We are prepared to offer you the following position.

CLERK-MODIFIED

PS-5, Current Step and Salary (Level 5, Step 0, $15.46/hr.)

Your daily work hours will be 8:00 AM to 5:00 PM Saturdays and Mondays and 11:00 AM to 5:00 PM Tuesday through Friday. Your duties will be as indicated below.

1. Check in Carriers: Approximately 45 carriers return from their routes beginning around 2:00 PM and normally ending around 4:00 to 4:30 PM. Work involves making a check mark or initial on a pre-printed form and placing of keys (2 keys on a chain) into appropriate separation in a case at

chest level. A verification is made to insure accountable mail given the carriers in the morning has either been delivered or returned. The normal process of checking in a single carrier takes approximately one minute with several minutes between carriers. In the case of several carriers arriving in a group, other clerks are available to assist you to prevent any form of repetitive action. This job assignment is the same as you have been performing since your return to work.

Page 2. Revised Job Offer

2. Answering Telephones: Assist managers by answering phones and taking written messages during the hours assigned which do not involve the check in of carriers. The telephone at this work station will be placed on the desk to eliminate any excessive reaching. A visual check and slight fingering of carrier **Hold Mail Cards** and **Change of Address Cards** will be required occasionally to answer customer inquiries. This task is also the same as that which you are presently performing with the exception that the hours are extended to provide you with a 40 hour week.

This revised job offer is being forwarded to your private physician, Dr. Gregory G. Orson and your physical therapist, Barbara K. Peterson for their assessment and approval. This letter must be returned within 10 days from the date of receipt with your election. If we fail to hear from you, we will consider our offer as rejected.

If you refuse to accept this position, we will so advise the Office of Workers' Compensation Programs. Refusal of this revised job offer may result in loss of compensation benefits.

/s/ D. Bellefeuille

D. Bellefeuille
MSC Manager/Postmaster
Fargo, ND 58102-9998

I accept this offer: **Subject to the conditions set forth below.

I reject this offer:

/s/ Marjorie Meester
Name

Name

9-17-91
Date

Date

cc: OWCP - Denver, CO
Timothy Hill, Atty.
cc: with cover letter: Dr. Orson
Ms. Peterson

**

1. Approval by attending physician and physical therapist;
2. That the position be regarded as permanent subject to final approval by the OWCP;
3. That I be entitled to two (2) consecutive days off each week and that I am only required to be scheduled for a five (5) day work week;
4. That I be entitled to frequent breaks as necessary."

As is illustrated, Mrs. Meester approved the job offer on the condition that she receive two consecutive days off as requested by her treating physician, Dr. Gregory G. Orson. Dr. Orson approved the job offer only upon the added conditions as is illustrated by his report that follows:

Fargo Clinic 737 Broadway
MeritCare Fargo, North Dakota 58123
We've Got the Touch (701) 234-2000
ORTHOPEDICS 09/24/91 RE: MEESTER, Marjorie
FARGO CLINIC #: 532754-9

Mrs. Meester is seen in recheck. She reports that she was having increased discomfort a couple of weeks ago. Also, there has been increased stress from work and trying to settle a permanent job description. She has had to take the last 2 weeks

off, which seemed to be giving her significant improvement.

Brief examination today shows continued tenderness about the right, greater than left, lateral epicondylar regions and dorsal forearms. Has tenderness about both the trapezial ridges and paracervical areas as well. She also has discomfort and tightness down the right paraspinal region to the sacral area.

We have received a job offer from the post office, which has been revised by the patient's attorney. I have reviewed the offer and the conditions set forth. I will approve this with the conditions. As noted on my 8/27/91 note, I do feel that she would do much better to work 5 days only and have 2 consecutive days off. Recheck 1 month.

/s/ G. Orson
GREGORY G. ORSON, M.D./kms

cc: Timothy Hill"

In summary, Mrs. Meester's doctor did not approve the position as structured, but rather approved the position with the conditions noted on the job offer. Subsequently, the Postal Service continually refused to provide the requested conditions and this lawsuit resulted.

2. Second, on page 4 of Respondent's Brief in Opposition, Respondent incorrectly states that Mrs. Meester's 25% impairment of her upper extremities prevented her from performing her duties as a postal clerk. However, in this case, it has been undisputed that Mrs. Meester was given a "CLERK-MODIFIED" position (see above job offer) when she returned to work and has been performing this position since March of 1991 with no complaints by the Postal Service. In fact, the "CLERK-MODIFIED" position Mrs. Meester currently holds is a postal clerk position that has been restructured to accommodate some of Mrs. Meester's physical limitations but has failed to fully accommodate Mrs. Meester's disability. Since "job restructuring" and "modified work schedules" are forms of reasonable accommodation, it should not be disputed that Mrs. Meester actually performs her original postal clerk position in a modified status. 29 C.F.R. § 1614.203(a)(6) and (c)(2)(ii). Clearly,

an employee who performs work that is actually a modification of the duties of the employee's pre-injury position is a "qualified individual with a disability". *Trimble v. Carlin*, 633 F.Supp. 367, 369-370 (E.D. Pa. 1986). As an end note, it should be pointed out that on April 25, 1998, the Postal Service did finally grant Mrs. Meester the accommodations of two consecutive days off each week after approximately eight (8) years of continued requests, and Mrs. Meester has had and will need further surgery due to the exasperation to her upper extremities.

3. Third, on page 5 of Respondent's Brief in Opposition, Respondent insinuates that Mrs. Meester does not perform essential work. At trial, Prairiewood Station Manager Richard Bolme, Mrs. Meester's boss, testified to the following:

> "Q: You can work Marj on a Monday through Friday, can't you?
> A: I can work her on any day. I mean, it's –
> Q: Okay, and that's because the work that she does needs to be done every day of the week, isn't that right?
> A: Yes.
> Q: It's meaningful work, right?
> A: Yes.
> Q: It's essential work down at the Prairiewood Station?
> A: Just like any other job, the job that you do -- this work that we do at Prairiewood as a postal service job.
> Q: This just isn't make work, is it?
> A: No, it's all work that has to be done."

Respondent also states at page 5 of its Opposition Brief that the position did not previously exist, it's not a regular postal service job and will be eliminated if and when Mrs. Meester leaves the employ of the Postal Service. However, Prairiewood Station Manager Richard Bolme testified as follows at trial:

> "Q: And when Marj leaves or retires, what have you -- you say that the position is going to disappear, but that work is going to have to be absorbed by somebody else, isn't it?
> A: That work has to be performed by somebody

else, yes. Somebody has to answer the phone whether it be her, a supervisor, another clerk."

Therefore, contrary to Respondent's statements, Mrs. Meester's position would not be eliminated but would, in fact, be absorbed by other employees.

4. Fourth, Respondent further argues at page 5 of its Opposition Brief that the Postal Service determined it could not provide Mrs. Meester with two consecutive days off because Mondays and Saturdays were the busiest days, and Sundays were always a day off. However, Respondent takes this language from a lower court decision citing no factual record for its support and fails to inform the Court that on April 25, 1998, the Postal Service finally granted Mrs. Meester two consecutive days off each week. In addition, at trial, Prairiewood Station Manager Richard Bolme testified that he could work Mrs. Meester on a Monday through Friday basis. *See* above-quoted trial testimony. Therefore, Respondent was never able to prove undue hardship with regard to accommodating Mrs. Meester with two consecutive days off each week.

Notwithstanding the above factual disputes, Respondent errs in stating that a failure to accommodate claim under the Rehabilitation Act raises precisely the same issue of a suitability determination under the Department of Labor Office of Workers' Compensation Program. Respondent fails to acknowledge that the Rehabilitation Act demands more than equality of treatment by the federal government, it requires **affirmative action** to accommodate employees with disabilities, unless such accommodation would impose an undue hardship on the employer. *Carr v. Reno*, 23 F.3d 525, 528 (D.C. Cir. 1994). Section 501 of the Rehabilitation Act demands a great deal from employers in the way of accommodation of its disabled employees. *Id.* at 530. Congress has placed a heavy burden on the Postal Service to accommodate individuals with handicaps, and courts have not taken lightly their role in enforcing the rights that the Act dictates. *Id.* at 531. Therefore, with regard to Respondent's argument that a suitability determination by the Department of Labor and a failure to accommodate claim under the Rehabilitation Act are one in the same, they are not. A much higher standard is required of the Postal Service in reasonably

accommodating its disabled workers as compared to the Department of Labor's standard in making a suitability determination.

Respondent appears to be arguing that the Postal Service only has a minimal duty to provide reasonable accommodations to its disabled employees. (Resp. Brf. 12-14.) Respondent even cites a religious accommodation case in support of its argument. *Id.* As this Court is aware, religious discrimination cases are held to a standard of accommodation that is no more than a de minimis cost to the employer. *Ansonia Board of Education v. Philibrook*, 479 U.S. 60 (1986). Whereas, disability discrimination cases analyzed under the Rehabilitation Act require the Postal Service to be a "model employer" of the disabled and impose upon the Postal Service an affirmative obligation to provide reasonable accommodations for its disabled workers. *Prewitt v. U.S.P.S.*, 662 F.2d 292, 307 (5th Cir. 1981). As a result, Respondent's attempt to have this case analyzed under a religious discrimination case standard is unfair and incorrect.

In summary, because Respondent has now admitted that the receipt of benefits under the FECA does not bar a subsequent failure to accommodate claim under the Rehabilitation Act, and because of the factual disputes in this case, this Court should grant certiorari and remand the matter back to the lower court for trial by jury. As stated by the Honorable Circuit Judge Heaney of the Eighth Circuit Court of Appeals in his dissent in this case, the mischief done by the lower court can only be undone by Congress, our court en banc, or the United States Supreme Court. (App. 18-19).

II. IMPORTANT FEDERAL QUESTION-RULE 10(c)-PUNITIVE DAMAGE ISSUE

With regard to the issue of whether punitive damages should be allowed against the Postal Service, Respondent argues that the United States District court for the District of North Dakota, Southeastern Division, refused to allow an amendment for punitive damages on the basis that the Amended Complaint was filed more than a year after the District Court's deadline for amending the Complaint to add new claims or defenses. (Resp. Brf. 15.) In response, the standard set forth in Rule 15 of the Federal Rules of

Civil Procedure was not properly followed by the lower court, and the lower court clearly abused its discretion on the issue of delay. "[D]elay alone . . . is an insufficient ground upon which to deny a motion to amend. Rather, the touchstone is whether the nonmoving party will be prejudiced if the amendment is allowed." *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984). Therefore, the lower court's first reason in denying Mrs. Meester's Motion to Amend, that of being filed too late, was insufficient.

Further, as is illustrated by the lower court's decision, the lower court granted amendments to Mrs. Meester's complaint on some issues at the same time when it denied Mrs. Meester's Motion to Amend the Complaint for a punitive damages claim. (Resp. App. 1a-13a.) Clearly, delay was an insufficient basis, and an abuse of discretion is substantiated by the fact that the lower court allowed other amendments at that time.

With regard to the substantive issue of whether or not the Postal Service should be subjected to a claim for punitive damages, Mrs. Meester points out that there is a conflict between the recent decision of *Baker v. Runyon*, 114 F.2d 668 (7th Cir. 1997) and the United States Supreme Court's decision in *Loeffler v. Frank*, 486 U.S. 549 (1988). Because of this contradiction, this Court should grant certiorari on this issue.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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